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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1184.

WILLIAM MILNE, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF WILLIAM M. WILSON, DECEASED, PLAINTIFF IN ERROR,

vs.

ANN MARIA DEEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 31, 1889.

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1 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Ann Maria Deen, plaintiff, and William Milne, as executor of the last will and testament of William M. Wilson, deceased, defendant, a manifest error hath happened, to the great damage of the said William Milne, as executor as aforesaid, as is said and as appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

2 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15th day of July, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States one hundred and fourteenth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

Allowed July 12, 1889.
WM. J. WALLACE.

3 [Endorsed:] E. & A. A. 841. Supreme Court of the United States. William Milne, as ex'r, &c., pl'ff in error, *vs.* Ann Maria Deen, def't in error. Writ of error. Davenport, Smith & Perkins, attorneys for pl'ff in error, No. 115 Broadway, New York city. Service of a copy of within writ of error is hereby admitted. Dated New York, July 12, 1889. Jas. K. Hill, Wing & Shoudy, att'ys for def't in error.

[Stamped:] U. S. circuit court. Filed Jul- 16, 1889. John A. Shields, clerk.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue

of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from four to sixty-two, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of William Milne, as executor of the last will and testament of William M. Wilson, deceased, plaintiff in error, against Ann Maria Deen, defendant in error, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this thirtieth day of July, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth.

JOHN A. SHIELDS, *Clerk.*

4 U. S. Circuit Court, S. D. of New York.

ANN MARIA DEEN
vs.
WILLIAM W. WILSON.

To the clerk of the U. S. circuit court, S. D. of N. Y.:

Please issue the summons in the above-entitled action.

Yours, &c., JAS. K. HILL,
WING & SHOUDY,
Pl'ff's Att'ys, 37 & 39 Wall St., N. Y. City.

Dated Feb. 23d, 1881.

(Endorsed:) Deen *v.* Wilson. Precipe. U. S. circuit court. Filed Feb. 23, 1881. Joseph M. Deuel, clerk.

5 United States Circuit Court for the Southern District of New York.

ANN MARIA DEEN, Plaintiff,
against
WILLIAM M. WILSON, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of New York, this 23d day of February, in the year one thousand eight hundred and eighty-one.

JOSEPH M. DEUEL, *Clerk.*

JAS. K. HILL,
WING & SHOUDY,
Plaintiff's Att'ys.

Office and post-office address: 37 & 39 Wall street, N. Y. city, New York.

6 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I hereby certify that on the 25th day of February, 1881, at the city of New York, I personally served the within summons on the within-named defendant, William M. Wilson, by showing to him the same and delivering to and leaving with him a true copy thereof, and at the same time and place I delivered to said defendant a copy of the complaint in this action.

LOUIS F. PAYNE,
U. S. Marshal.

(Endorsed:) United States circuit court, southern district of New York. Ann Maria Deen *vs.* William M. Wilson. Summons. Jas. K. Hill, Wing & Shoudy, plaintiff's attorneys, 37 & 39 Wall street, N. Y. city. U. S. circuit court. Filed Feb. 25, 1881. Joseph M. Deuel, clerk.

7 Circuit Court of the United States for the Southern District of New York.

ANN MARIA DEEN, Plaintiff. *against* WILLIAM M. WILSON, Defendant. } Complaint.

The plaintiff above named, by Jas. K. Hill, Wing and Shoudy, her attorneys, complains and avers:

First. That during all the times hereinafter mentioned the plaintiff, Ann Maria Deen, was and still is a citizen of the State of New Jersey, and that during the same times the defendant, William M. Wilson, was and still is a citizen of the State of New York, in the southern district thereof, within the second circuit of this court.

Second. That on the 29th day of October, 1873, the plaintiff and one Mary C. C. Perry duly executed, under their hands and seals, in duplicate, a lease, partly written and partly printed, a copy of which is hereunto annexed, marked "Schedule A."

Third. That at the same time and as a part of the same transaction the defendant duly executed under his hand and seal a guarantee, a copy of which is hereunto annexed, marked "Schedule B," and thereupon the said lease and guarantee were duly delivered to the plaintiff.

8 Fourth. That thereupon the said Mary C. C. Perry entered into the possession of the premises mentioned in said lease and paid to the plaintiff the sum of four hundred and fifty dollars as and for the first month's rent under said lease.

Fifth. That neither the said Mary C. C. Perry nor the defendant have ever paid any further or other rent reserved by said lease.

Sixth. That the premises mentioned in said lease consisted of a very valuable dwelling-house, with the furniture therein, and were

leased to the said Perry to be occupied by her as a dwelling-house and for no other purpose.

That at some time in or after the month of December, 1873, the said Mary C. C. Perry ceased to occupy the said house as a dwelling-house and abondoned the same, leaving the said house and furniture in an unprotected condition and liable to suffer great damage by reason of said abandonment.

That in consequence of such abandonment the said house and furniture were greatly damaged; and afterwards and on or about the first day of December, 1874, the plaintiff, for the purpose of preserving the premises, protecting the property, and preventing further injury thereto by reason of such abandonment, and of diminishing as far as possible the loss sustained by her by reason of the failure of said Perry to continue to occupy the said premises as a dwelling-house and abandoning the same, after notice to said Perry, proceeded to let the said premises on account of the said Perry for the sum of three hundred dollars per month for the remainder of the term mentioned in said lease, that being the highest rent that could be obtained therefor.

9

Seventh. That there is due and unpaid under said lease, for the rent therein reserved, up to December 1st, 1874, the sum of five thousand four hundred dollars, besides the interest which accrued on each month's rent, of four hundred and fifty dollars, from the time it became due under said lease according to the terms thereof, and for rent after December 1st, 1874, to the end of the term of said lease, after crediting the defendant with the amount collected from the occupant of the said house from that date, a balance of three thousand one hundred and fifty dollars for rent after December 1st, 1874.

That no part of the said sums of five thousand four hundred dollars or three thousand one hundred and fifty dollars, amounting in the aggregate to eight thousand five hundred and fifty dollars, has been paid.

Wherefore plaintiff demands judgment against said defendant for said sum of eight thousand five hundred and fifty dollars, with interest thereon from average monthly date of payment, besides the costs and disbursements of this action.

JAS. K. HILL,
WING & SHOUDY,
Plaintiff's Attorneys, Numbers 37 & 39
Wall St., New York City.

10

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Ann Maria Deen, being duly sworn, says that she is the plaintiff named in the foregoing complaint; that she has read the said complaint and knows the contents thereof; that the same is true of her own knowledge except as to the matters which are therein stated to be alleged upon information and belief, and that as to those matters she believes it to be true.

A. M. DEEN.

Subscribed and sworn to before me this 19th day of February, 1881.

ALEX. CAMERON,
Notary Public, Kings Co., N. Y.

Cert. filed in N. Y. Co.

11 This indenture, made the 29th day of October, one thousand eight hundred and seventy-three, between Ann Maria Deen, of the city of New York, party of the first part, and Mary C. C. Perry, of the same place, party of the second part, witnesseth:

That the said party of the first part hath letten, and by these presents doth grant, demise, and to farm let, unto the said party of the second part the house known as number four East Thirtieth street, in the city of New York, with the furniture therein, a schedule of which is to be made in duplicate upon the party of the second part taking possession of the premises, and to be annexed to this lease, to be used as a dwelling-house and for no other purposes whatever, with the appurtenances, for the term of two years and ten months from the first day of November, one thousand eight hundred and seventy-three, at the rent or sum of four hundred and fifty dollars per month, payable on the first day of each month, in advance.

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and to remove all persons therefrom; and the said party of the second part hereby covenants to pay to the said party of the first part the said rent, as herein specified; and also to pay

12 the regular annual rent or charge which is or may be assessed or imposed according to law upon the said premises for the Croton water on or before the first day of August in each year during the term, and, if not so paid, the same shall be added to the month's rent then due. And the said party of the second part further covenents that she will not assign this lease, nor let or underlet the whole or any part of the said premises, nor make any alteration therein, without the written consent of the said party of the first part, under the penalty of forfeiture and damages, and that she will not occupy or use the said premises nor permit the same to be occupied or used for any business deemed extra hazardous on account of fire or otherwise, without the like consent, under the like penalty. And the said party of the second part further covenants that she will permit the said party of the first part or her agent to show the premises to persons wishing to hire or purchase, and on and after the first day of February next preceding the expiration of the term will permit the usual notice of "to let" or "for sale" to be placed upon the walls or doors of said premises and remain thereon without hindrance or molestation.

And it is further agreed between the parties to these presents that in case the building or buildings erected on the premises hereby leased shall be partially damaged by fire, the same shall be repaired as speedily as possible at the expense of the said party of the first

part; that in case the damage shall be so extensive as to ren-
13 der the building untenantable, the rent shall cease until such time as the building shall be put in complete repair; but in case of the total destruction of the premises by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth this lease shall cease and come to an end: Provided, however, That such damage or destruction be not caused by the carelessness, negligence, or improper conduct of the party of the second part, her agents or servants.

And at the expiration of the said term the said party of the second part will quit and surrender the premises hereby demised and the said furniture in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

And it is further understood and agreed that the party of the second part shall make all repairs that may become necessary during the continuance of the term hereby demised, and leave the furnace and range in good repair and condition. And the said party of the first part doth covenant that the said party of the second part, on paying the said rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid.

And it is further understood and agreed that the covenants and agreements contained in the within lease are binding on the parties hereto and their legal representatives.

14 In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

(S'g'd) ANN MARIA DEEN. [SEAL.]
(S'g'd) MARY C. C. PERRY. [SEAL.]

Sealed and delivered in the presence of—

15 SCHEDULE "B."

In consideration of the letting of the premises within mentioned to the within-named Mary C. C. Perry, and the sum of one dollar to me paid by the said party of the first part, I, William M. Wilson, do hereby covenant and agree to and with the party of the first part above named and her legal representatives that if default shall at any time be made by the said Mary C. C. Perry in the payment of the rent and performance of the covenants contained in the within lease on her part to be paid and performed that I will well and truly pay the said rent or any arrears thereof that may remain due unto the said party of the first part, and also all damages that may arise in consequence of the non-performance of said covenants or either of them without requiring notice of any such default from the said party of the first part.

Witness my hand and seal this 29th day of October, in the year one thousand eight hundred and seventy-three.

(S'g'd) W. M. WILSON. [SEAL.]

Witness:

(Endorsed:) Ann Maria Deen to Mary C. C. Perry. Lease. C. W., fire clause, &c. Dated October, 1873.

16 (Endorsed:) U. S. circuit court, S. D. of N. Y. Ann Maria Deen ag'st William M. Wilson. Complaint. Wing & Shoudy, attorneys for plaintiff, 37 & 39 Wall St., New York city. U. S. circuit court. Filed Feb. 23, 1881. Joseph M. Deuel, clerk.

17 Circuit Court of the United States for the Southern District of New York.

ANN MARIA DEEN, Plaintiff,
against
WILLIAM M. WILSON, Defendant.

The defendant, answering plaintiff's complaint, says that he admits the residence of plaintiff and of himself and their citizenship as stated in the complaint.

Defendant, further answering, says that the alleged lease and guaranty set forth in the complaint, and copies of which are thereto annexed, were never executed and were never delivered.

That in the latter part of October, 1873, Mary C. C. Perry went to the premises in the complaint described, which were offered to let furnished.

That said Mary C. C. Perry examined the premises and found a considerable part of the furniture missing; that said Mary C. C. Perry told plaintiff that she wanted to hire a furnished house, to be used by her as a first-class boarding-house from the following first day of November; that plaintiff was also told that said Mary C. C. Perry had no furniture to supply any deficiencies, with a few expressed exceptions, and had no money with which to buy such furni-

18 ture. Plaintiff then represented that the missing furniture was out, to be cleaned and repaired, and would all be put back before the first day of November, and described the furniture to be such as was fit and proper and complete for the purposes of said Mary C. C. Perry.

Upon condition that such furniture should be put in and in entire reliance upon the said representations and promises of plaintiff, said Mary C. C. Perry agreed to take the house, with such furniture in, at a rent of four hundred and fifty dollars per month for a term of two years and ten months from November 1st, 1873; and defendant, upon the same conditions and in reliance upon the same representations and promises, which were made to him as well as to said Mary C. C. Perry, agreed if the said Mary C. C. Perry took the house with such furniture in for such term that he would become surety for the rent under said proposed guaranty.

The plaintiff had prepared in advance the papers set forth in the complaint, but the same were incomplete, and she promised to complete the same by adding thereto a schedule of the furniture which she agreed and promised to put into the house, and which said schedule was to be signed by the said Mary C. C. Perry and herself, and thereupon said proposed lease was to be delivered and become

operative and said guaranty was to be delivered and become operative. Upon this promise and agreement plaintiff induced defendant and said Mary C. C. Perry to sign the proposed lease and
19 guaranty, but such papers were not to take effect or become operative until such furniture was put into the house and a schedule of said furniture complete was annexed to said paper and signed by said Mary C. C. Perry and said plaintiff.

Plaintiff never did put such furniture into said house and never intended so to do, and a schedule of said furniture complete was never annexed to said paper or signed.

Plaintiff willfully and falsely made the aforesaid and other like representations and promises, with no intention to fulfill the same and with knowledge of their falsity, for the express purpose of deceiving the said Mary C. C. Perry and this defendant and to fraudulently obtain from them their signature to such papers, and also to obtain from them the sum of four hundred and fifty dollars in advance, of one month's rent of said premises; which sum of money this defendant, relying upon and deceived by such representations and promises and at the request of said Mary C. C. Perry (who equally relied upon and was deceived by such promises and representations), paid to plaintiff.

That said Mary C. C. Perry repeatedly went to said house from the time of signing said paper up to the 7th day of November then next; that the furniture never was put into said house according to the agreement, promise, and representation of plaintiff, and said schedule never was prepared or signed, and said proposed guaranty and proposed lease never was actually delivered, although
20 said Mary C. C. Perry constantly made demand on plaintiff that it should be done and constantly declared to plaintiff that she could not and would not take possession of said house until said furniture was placed therein complete and until said schedule thereof was signed and said proposed lease and proposed guaranty delivered in conformity with the agreements, promises, and representations under which they had been signed in anticipation of such delivery.

That said Mary C. C. Perry, after such unsuccessful demands, abandoned of necessity all further attempts to obtain said house furnished or the delivery of said lease.

2nd. And for a further, separate, and distinct defense this defendant, answering, says that in the month of December, 1873, this plaintiff brought an action in the marine court of the city of New York against this defendant for the rent of said premises in the complaint described for the said month of December, 1873, being for the same cause of action as that set forth in the complaint herein, and this defendant recovered judgment against the plaintiff, duly given upon the merits thereof, in said action and for fifty-five dollars and ninety-one cents, the costs of said action.

The defendant denies each and every allegation of plaintiff's complaint not hereinbefore admitted, and prays that the same be dismissed with costs.

JOHN CHETWOOD,
Def't's Att'y, 74 B'dway, N. Y.

21 SOUTHERN DISTRICT OF NEW YORK, *ss:*

William M. Wilson, being duly sworn, says that he is the defendant in this action; that the foregoing answer is true, of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

W. M. WILSON.

Sworn to before me this April 11th, 1881.

ADAM GOS,
Notary Public, N. Y. Co.

(Endorsed:) U. S. circuit court, south. dist. N. Y. Ann Maria Deen ag'st William M. Wilson. Answer. John Chetwood, att'y def't, 74 Broadway, N. Y. Service admitted April 12, 1881. U. S. circuit court. Filed Apr. 12, 1881. Joseph M. Deuel, clerk.

22 At a stated term of the circuit court of the United States for the southern district of New York, held in the United States court-rooms, in the post-office building, in the city of New York, on the 23rd day of July, 1889.

Present: Hon. E. Henry Lacombe, circuit judge.

ANN MARIA DEEN, Plaintiff,
against
WILLIAM MILNE, as Executor, &c., of William M. Wilson, Deceased, Defendant.

On the foregoing affidavit and on the annexed consent and on motion of Jas. K. Hill, Wing & Shoudy, attorneys for the plaintiff, it is—

Ordered, That this action be revived and continued in the name of William Milne, as executor, &c., in the place of William M. Wilson, deceased, and that this order be entered *nunc pro tunc* as of the 20th day of June, 1887.

E. HENRY LACOMBE.

23 Circuit Court of the United States for the Southern District of New York.

ANN MARIA DEEN, Plaintiff,
against
WILLIAM MILNE, as Executor, &c., of William M. Wilson, Deceased, Defendant.

CITY AND COUNTY OF NEW YORK, *ss:*

Joseph A. Shoudy, being duly sworn, says that he is one of the attorneys for the plaintiff in the above-entitled action; that this is an action at law upon contract for the recovery of money alleged to be due under a lease of certain premises in the city and county of

New York. The defendant Wilson was sued as surety. During the pendency of this action, and on or about the 2nd day of April, 1884, the defendant, William M. Wilson, died, being at the time of his death a resident and inhabitant of the city and county of New York, and having duly made and published his last will and testament, whereby he appointed William Milne the executor thereof; that said Wilson died on the 2nd day of April, 1884; that thereafter his will was duly approved and admitted to probate, before the surrogate of the county of New York, on the 19th day of April, 1884, and letters testamentary were thereupon issued to William Milne, who duly qualified as such executor and accepted the trust
24 thereby conferred, and became and now is such executor.

That the death of said Wilson occurred while this cause was pending in the Supreme Court of the United States on a writ of error, and in said court an order was made reviving the said action in the name of the said Milne, as such executor, and after such revival by the judgment of said court a new trial was granted; that such new trial has been had without any formal order having been made in this court for the revival of this action.

J. H. SHOUDY.

Subscribed and sworn to before me this 23rd day of July, 1889.
F. L. COLLIER,
Notary Public, Kings County.

Certificate filed in New York county.

(Endorsed:) Circuit court of the U. S., S. D. of New York. Ann Maria Deen, pl'ff, *vs.* William Milne, as executor, &c., def't. Affidavit & order. Jas. K. Hill, Wing & Shoudy, attorneys for pl'ff, 45, 49 William street, New York city. We hereby consent to the entry of the within order. July 23, '89. Davenport, Smith & Perkins, att'ys for def't. U. S. circuit court. Filed Jul- 29, 1889; *nunc pro tunc* as of June 20, 1887. John A. Shields, clerk.

25 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Thursday, the 9th day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable Wm. J. Wallace, circuit judge.

ANN MARIA DEEN
vs.
WILLIAM MILNE, Executor of William M. Wilson, Deceased.

Now comes the plaintiff, by Hill, Wing & Shoudy, Esqs., her attorneys, and moves the trial of this cause; likewise comes the defendant, by Davenport, Smith & Perkins, Esqs., his attorneys. Thereupon a jury is empaneled and the cause proceeds to trial. After hearing the evidence of the parties and the argument of counsel, on the 13th day of May, 1889, the court directs the jury to find a

verdict for the plaintiff in the amount of 16,328.77 dollars. Thereupon the jury render a verdict, whereby they find for the plaintiff in the amount of 16,328.77 dollars.

It is ordered that the defendant have a stay of all proceedings on said verdict for thirty days from May 13th, 1889.

JOHN A. SHIELDS, *Clerk.*

26 United States Circuit Court, Southern District of New York.

ANN MARIA DEEN
vs.
WILLIAM MILNE, Executor of William M. Wilson, Deceased. } Judgment.

This cause having been tried at a stated term of this court, held in the U. S. court-house & P. O. building, in the city of New York, before Hon. William J. Wallace, on the 9th & 13th days of May, 1889, and a verdict having been rendered for the plaintiff, by direction of the court, for the sum of sixteen thousand three hundred and twenty-eight $\frac{77}{100}$ dollars, and plaintiff's costs having been taxed by the clerk of this court at the sum of $141.24, now, on motion of Jas. K. Hill, Wing & Shoudy, plaintiff's attorneys, it is ordered, adjudged, & decreed that Ann Maria Deen, the plaintiff, do recover of William Milne, executor of William M. Wilson, deceased, the sum of $16,328.77, the amount of the verdict, with interest thereon from the 13th day of May, 1889, the day of the rendition of the same, amounting to the sum of $163.29, together with the sum of $141.24, costs as taxed by the clerk of this court, amounting in the aggregate
27 to the sum of $16,633.30, and that she have execution therefor.

Judgment signed this 9th day of July, 1889.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) U. S. circuit court, S. D. of N. Y. Ann Maria Deen *v.* William Milne, exec'r of Wm. M. Wilson, deceased. Judgment. July 9, 1889. Jas. K. Hill, Wing & Shoudy, plaintiff's att'ys, 45 & 49 William St., New York city. U. S. circuit court. Filed Jul- 9, 1889. John A. Shields, clerk.

28 United States Circuit Court, Southern District of New York.

ANN MARIA DEEN, Plaintiff,
against
WILLIAM MILNE, as Executor of the Last Will and Testament of William M. Wilson, Deceased, Defendant.

The issues joined in this action against defendant's testator, William M. Wilson, deceased, for whom the present defendant, as his legal representative, has been duly substituted, came on to be tried by a jury before the Hon. William J. Wallace, at a circuit court held at the city of New York, in and for the southern district of New York, on the 9th day of May, 1889, and such trial was had on the

said 9th and on the 13th days of May, 1889. Upon the trial of the said action counsel for the plaintiff, to maintain and prove the issues on her part, proved the execution of the following lease and offered the same in evidence; it is as follows:

"This indenture, made the 29th day of October, one thousand eight hundred and seventy-three, between Ann Maria Deen, of the city of New York, party of the first part, and Mary C. C. Perry, of the same place, party of the second part, witnesseth:

"That the said party of the first part hath letten, and by these
29 presents doth grant, demise, and to farm let, unto the said party of the second part the house known as number four East Thirtieth street, in the city of New York, with the furniture therein, a schedule of which is to be made in duplicate upon the party of the second part taking possession of the premises, and to be annexed to this lease, to be used as a dwelling-house and for no other purpose whatever, with the appurtenances, for the term of two years and ten months from the first day of November, one thousand eight hundred and seventy-three, at the rent or sum of four hundred and fifty dollars per month, payable on the first day of each month, in advance.

"And it is agreed that if any rent shall be due and unpaid or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and to remove all persons therefrom; and the said party of the second part hereby covenants to pay to the said party of the first part the said rent as herein specified, and also to pay the regular annual rent or charge which is or may be assessed or imposed according to law upon the said premises for the Croton water on or before the first day of August in each year during the term, and if not so paid the same shall be added to the month's rent then due; and the said party of the second part further covenants that she will not assign this lease, nor let or underlet the whole or any
part of the said premises, nor make any alterations therein
30 without the written consent of the said party of the first part, under the penalty of forfeiture and damages, and that she will not occupy or use the said premises nor permit the same to be occupied or used for any business deemed extra hazardous on account of fire or otherwise, without the like consent, under the like penalty; and the said party of the second part further covenants that she will permit the said party of the first part or her agent to show the premises to persons wishing to hire or purchase, and on and after the first day of February next preceding the expiration of the term will permit the usual notices, 'to let' or 'for sale,' to be placed upon the walls or doors of said premises and remain thereon without hindrance or molestation.

"And it is further — between the parties to these presents that in case the building or buildings erected on the premises hereby leased shall be partially damaged by fire the same shall be repaired as speedily as possible at the expense of the said party of the first part; that in case the damages shall be so extensive as to render the build-

ing untenantable the rent shall cease until such time as the building shall be put in complete repair; but in case of the total destruction of the premises, by fire or otherwise, the rent shall be paid up to the time of such destruction, and then and from thenceforth this lease shall cease and come to an end: Provided, however, That such damages and destruction be not caused by the carelessness, negligence, or improper conduct of the party of the second part,
31 her agents or servants; and that at the expiration of the said term the said party of the second part will quit and surrender the premises hereby demised and the said furniture in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

"And it is further understood and agreed that the party of the second part shall make all repairs that may become necessary during the continuance of the term hereby demised, and leave the furniture and range in good repair and condition.

"And the said party of the first part doth covenant that the said party of the second part, on paying the said rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid.

"And it is further understood and agreed that the covenants and agreements contained in the within lease are binding on the parties hereto and their legal representatives.

"In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

"ANN MARIA DEEN. [L. S.]
"MARY C. C. PERRY. [L. S.]

"Sealed and delivered in the presence of—
—— ——."

32 Plaintiff also proved and offered in evidence the following agreement, which was written on the said lease:

"In consideration of the letting of the premises within mentioned to the within-named Mary C. C. Perry and the sum of one dollar to me paid by the said party of the first part, I, William M. Wilson, do hereby covenant and agree to and with the party of the first part above named and her legal representatives that if default shall at any time be made by the said Mary C. C. Perry in the payment of the rent and the performance of the covenants contained in the within lease on her part to be paid and performed that I will well and truly pay the said rent or any arrears thereof that may remain due unto the said party of the first part, and also all damages that may arise in consequence of the non-performance of said covenants or either of them without requiring notice of any such default from the said party of the first part.

"Witness my hand and seal this 29th day of October, in the year one thousand eight hundred and seventy-three.

"W. M. WILSON. [L. S.]

"Witness:
—— ——."

Plaintiff's counsel read in evidence testimony of Henry M. Walker, given in a former action between these parties, and who testified that he was an attorney and counsellor at law and knew Mrs. Perry and recollected the lease of number 4 East Thirtieth street.

33 The witness was then asked the following question:

"How did it come into your possession?"

To which question counsel for the defendant objected as immaterial; but the court overruled the objection and defendant duly excepted. Thereupon the witness replied that Mrs. Perry handed the said lease to the witness to return to Mrs. Deen; that he did so return it; that he called upon Mrs. Deen for that purpose, but was unable to see her, and that he sent it to her by mail, together with a letter written by himself.

Counsel for plaintiff then asked the witness the following question:

"Is this the letter from you to Mrs. Deen?"

To which question defendant's counsel objected as immaterial; but the court overruled the objection, and defendant duly excepted.

The witness replied that he believed it was the letter, but he was not sure whether it was the one which accompanied the lease, but thought he had written another letter to Mrs. Deen with the lease.

Plaintiff's counsel offered the said letter in evidence. Defendant's counsel objected, not on the ground that the original was not produced, but as immaterial and incompetent, being a letter from a third person, who was not shown to have any authority to write it; but the court overruled the objection, and defendant's counsel duly excepted. The letter is as follows:

34 "NEW YORK, *Nov. 11th*, 1873.

"Mrs. M. A. Deen, present.

"DEAR MADAME: Mrs. Perry has asked me to notify you that she will not take possession of your house, No. 4 30th street, and repudiates her signature to the lease, as she considers it was obtained by false representation, and will require you to pay her back the month's rent she paid you, amounting to $450.

"Yours resp'ly, HENRY M. WALKER.

"She returns the lease cancelled."

Defendant's counsel, without waiving his objection to the immateriality of the fact, admitted that the lease referred to in the foregoing letter was a duplicate copy of the lease already put in evidence, and was returned to Mrs. Deen by the witness with Mrs. Perry's name cancelled. At the same time defendant's counsel objected to the materiality of such fact; but the court overruled the objection, and defendant's counsel duly excepted.

Plaintiff's counsel then called Charles Murray, who, being duly sworn, testified that in the year 1874 he was a clerk in the office of James K. Hill, who was attorney for Mrs. Deen at that time. Witness further testified that on March 27th, 1874, he served on Mrs. Perry a paper, a copy of which was produced, and the said paper

was offered in evidence by counsel for the plaintiff. Defendant's counsel object thereto as immaterial and incompetent to bind defendant. Plaintiff's counsel stated that he would follow up the
35 proof by showing service of a similar paper on defendant's testator. The court overruled defendant's objection, and the defendant duly excepted.

The paper offered and received in evidence was as follows:

"NEW YORK, *March 27th*, 1874.

"DEAR MADAME: As you appear to have abandoned the house No. 4 East 30th street to the man John, and I am informed that there is great danger of the furniture being injured, removed, and lost, I shall, in order to protect the property, take possession of the premises on the 1st day of April next and rent them for the remainder of your term on your account and look to you for any deficiency in rent and expenses on reletting, as well as for all damages that I may have sustained by reason of the loss of or injury to the furniture up to that date. If you have any objection to my taking possession of the premises, be kind enough to inform me by letter addressed to the care of James K. Hill, 62 Wall street, New York city.

"Yours, &c., A. M. DEEN."

Plaintiff's counsel then showed the witness another paper, and the witness testified that he served a copy of it personally upon defendant's testator on March 27th, 1874. Plaintiff's counsel offered the said paper in evidence. Defendant's counsel objected to it as immaterial and incompetent and on the ground that the original
36 was the best evidence and must be produced. The plaintiff's counsel then and there gave notice to defendant's attorney and counsel to produce the paper so delivered to Mrs. Wilson.

Defendant's counsel claimed that the notice was insufficient and refused to accept it. This was on the first day of the trial, on Thursday, the 9th of April. And the court thereupon said that counsel might look among his papers for the papers during recess, and said that if the paper was not found the court would rule that the notice was insufficient. After recess the trial was resumed, but no question was then asked or response made by defendant's counsel. On the adjourned day of the trial defendant's counsel stated that he had looked among his papers and did not find the paper called for. The court overruled the said objection, and defendant's counsel duly excepted. The said paper was admitted in evidence; it is as follows:

"NEW YORK, *March 27th*, 1874.

"DEAR SIR: As Mrs. Perry appears to have abandoned the house No. 4 East 30th street to the man John, and I am informed that there is great danger of the furniture being injured, removed, and lost, I shall, in order to protect the property, take possession of the premises on the 1st day of April next and rent them for the remainder of her term on her account and look to her and you for any deficiency in rent and expenses in reletting, as well as for all damages

that I may have sustained by reason of the loss of or injury
37 to the furniture up to that date. If you have any objection to my taking possession of the premises, be kind enough to inform me by letter addressed to the care of James K. Hill, 62 Wall street, New York city.

"Yours, &c., A. M. DEEN."

Being cross-examined, witness testified that he gave no evidence in regard to the service of the notice on defendant's testator on the previous trial, although he was then a witness and testified in regard to the service of the notice on Mrs. Perry; that according to his recollection he was not asked on the former trial about the service of the notice on Mr. Wilson.

SAMUEL D. BURCHARD, a witness called on behalf of the plaintiff, being duly sworn, then testified that he resided in the city of New York, was a clergyman, and was acquainted with Mrs. Deen, and knew her house, 4 East 30th street; that he remembered passing the said house in March, 1874, between eight and nine o'clock in the evening.

Witness was then asked the following question: "Did you notice whether there was anybody in the house or not?"

Defendant's counsel objected to the said question as immaterial. Plaintiff's counsel stated that they proposed to connect it by showing that the witness stated what he observed to Mrs. Deen, and that Mrs. Deen gave the notice hitherto offered in evidence. The court overruled defendant's objection, and defendant duly excepted.

The witness stated in answer to the said question that he
38 was passing the house 4 East Thirtieth street in the evening and some females came to the door and asked him to come in; that he inferred from their dress and their language that they were improper persons.

Witness was then asked the following question:

"Did you communicate what you saw and heard there on that occasion to Mrs. Deen?"

Defendant's counsel objected to the question as immaterial. The court overruled the objection, and defendant's counsel duly excepted.

Answer. "I did. I told her in substance that I thought the house was tenanted by improper persons."

This communication was made immediately after the occurrence, in March, 1874.

ANN MARIA DEEN, called as a witness in her own behalf, being duly sworn, testified that she had heard the testimony of Doctor Burchard. Witness was then asked the following question:

"Do you remember of his communicating to you the fact that your house was being used for improper purposes?"

To which question defendant's counsel objected as immaterial. The objection was overruled, and defendant's counsel duly excepted.

Answer. "I do; yes, sir."

Q. "Can you state when it was that he made that communication to you?"

Defendant's counsel object as immaterial; but the court over-
39 ruled the objection, and defendant's counsel duly excepted.

A. "It was in March, about the date of the notice heretofore put in evidence. It may have been a little before; I don't exactly remember. It was in the fore part of March."

The witness further testified that she remembered receiving a letter from Mr. Walker, with the lease enclosed, at the date of the letter, and that after she got the information from Dr. Burchard she signed the notices which had been produced and offered in evidence and directed them to be served.

Witness was then asked whether she received any notice in reply either from Mrs. Perry or Mr. Wilson.

Defendant's counsel objected to this question as immaterial; but the court overruled the objection, and defendant duly excepted.

The witness replied to the question that he did not receive any notice of any kind.

Witness further testified that about the 29th of April, 1874, she went upon the premises. She was then asked the following question:

"What did you find to be the condition of things in the house?"

Defendant's counsel objected to this question as immaterial; but the objection was overruled by the court, and defendant's counsel duly excepted.

The witness replied to the question that the furniture in some of the premises was very badly used.

40 Witness was then asked whether any one was in possession at that time.

To which question defendant's counsel objected as immaterial; but the objection was overruled, and defendant's counsel duly excepted.

The witness replied to the question that there was a man named John there; that she had not put him into possession. She further testified that after she went into the house she endeavored to procure a tenant for the premises.

Witness was then asked the following question: "What effort did you make?"

To which question defendant's counsel objected as immaterial. The objection was overruled, and defendant duly excepted.

Witness replied to the question that she advertised the house and put it into two or three agents' hands and had a bill put upon the house; that she had some offers, but did not consider them sufficient to warrant her renting, and that the first party whom she thought she could depend upon was Mr. Sherman, to whom she

rented it from the first of December, 1874. The witness produced a paper which she stated to be the lease to Mr. Sherman.

Said lease was offered in evidence, but defendant's counsel objected to it as immaterial. The court overruled the objection, and defendant's counsel duly excepted.

The lease was received in evidence and is as follows:

"This indenture, made the 27th day of November, one thousand eight hundred and seventy-four, between Ann Maria Deen,
41 wife of John L. Deen, of New Providence, Union county, in the State of New Jersey, party of the first part, and David H. Sherman, of the city, county, and State of New York, party of the second part, witnesseth:

"That the said party of the first part hath letten, and by these presents doth grant, demise, and to farm let, unto the said party of the second part the premises known as No. 4 East 30th street, in the city of New York, to be used and occupied only as a private dwelling, together with two mantel mirrors and one pier glass, with cornice on parlor floor and one pier glass with cornice on second floor, and also all the gas fixtures in and upon said premises, with the appurtenances, for the term of two years and five months from the first day of December, one thousand eight hundred and seventy-four, at the yearly rent or sum of thirty-six hundred dollars, to be paid in equal half-yearly payments, in advance.

"And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and to remove all persons therefrom: and the said party of the second part hereby covenants to pay to the said party of the first part the said yearly rent as herein specified, and also to pay the regular annual rent or charge which is or may be assessed or imposed according to law upon the said premises for the Croton water on or before the first day of August in each year during the term, and if not so paid the same shall be added to the rent then due; and the said
42 party of the second part further covenants that he will not assign this lease, nor let or underlet the whole or any part of the said premises, nor make any alteration therein without the written consent of the said party of the first part, under the penalty of forfeiture and damages, and that he will not occupy or use the said premises nor permit the same to be occupied or used for any business deemed extra hazardous on account of fire or otherwise, without the like consent, under the like penalty; and the said party of the second part further covenants that he will permit the said party of the first part or her agents to show the premises to persons wishing to hire or purchase, and on and after the first day of February next preceding the expiration of the term will permit the usual notice of 'to let' or 'for sale' to be placed upon the walls or doors of said premises and remain thereon without hindrance or molestation.

"And it is further agreed between the parties to these presents that in case the building or buildings erected on the premises hereby

leased shall be partially damaged by fire the same shall be repaired as speedily as possible at the expense of the said party of the first part; that in case the damage shall be so extensive as to render the building untenantable the rent shall cease until such time as the building shall be put in complete repair, but in case of the total destruction of the premises by fire or otherwise the rent shall be paid up to the time of such destruction, and then and from thenceforth this lease shall cease and come to an end: Provided, however, That such damage or destruction be not caused by the carelessness, negligence, or improper conduct of the party of the second part, his agents or servants.

43

"And the party of the second part hereby further agrees to make all repairs in and about the said demised premises that may be necessary to keep and maintain the same in good, tenantable condition.

"And that at the expiration of the said term the said party of the second part will quit and surrender the premises hereby demised, and also the said mirrors, pier glasses, cornices, and gas fixtures, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

"And the said party of the first part doth covenant that the said party of the second part, on paying the said yearly rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy the said demised premises for the term aforesaid.

"And it is further understood and agreed that the covenants and agreements contained in the within lease are binding on the parties hereto and their legal representatives.

"In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

"ANN MARIA DEEN. [L. S.]
"DAVID H. SHERMAN. [L. S.]

"Sealed and delivered in the presence of—
"GEO. CONOVER.

"(Endorsed:) Ann Maria Deen to David H. Sherman. Lease. C. W., fire clause, &c. Dated Nov. 27th, 1874.

44

"CITY AND COUNTY OF NEW YORK, *ss:*

"On this 10th day of May, 1883, before me personally came George Conover, subscribing witness to the within lease, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of Brooklyn, New York; that he was acquainted with Ann Maria Deen & David H. Sherman and knew them to be the persons described in and who executed the said conveyance, and that he saw them execute and deliver the same, and that they acknowledged to him, the said George Conover, that they executed and delivered the same, and that he, said George Conover, thereupon subscribed his name as a witness thereto.

"SIMEON FORD,
"*Notary Public, Kings Co.*

"Cert. filed in N. Y. Co."

The witness was then asked the following question: "Why did you not let the furniture with the house to Mr. Sherman?"

Defendant's counsel objected to the question as immaterial and incompetent; but the objection was overruled, and defendant duly excepted.

The witness stated in reply to the question that Mr. Sherman was unwilling to hire the house furnished. Witness further testified that Mr. Sherman's offer was the best opportunity which she had to rent the house; that Mrs. Perry never paid her any part of
45 the rent, and that she received Mr. Wilson's check for the first month's rent, which was all that was ever paid on the lease. Being cross-examined, the witness testified that she never informed Mrs. Perry or Mr. Wilson of the fact that she had rented the premises to Mr. Sherman; that on the 1st of November, 1883, being at the house 4 East 30th street with Mrs. Perry she gave the keys of the house to Mrs. Perry, and that Mrs. Perry took full possession of the house on that day; that the man John mentioned in the witness' direct examination was present when the witness gave the keys to Mrs. Perry, and that witness' daughter was also present; that Mrs. Perry gave one of the keys to John, but that witness did not remember whether she gave the other key to John as well; that John was a servant of Mrs. Perry's and had been such for several years, and assisted in bringing Mrs. Perry's things there, and that witness had never seen him before.

Defendant's counsel then read to the witness her testimony on the previous trial, to the effect that there were two keys to the house; that the witness handed both to Mrs. Perry, and then she handed them to John and told him to take charge of them, and to give one to Mr. Wilson, a son of defendant's testator, if he wanted it, and to take charge of the other.

Defendant's counsel asked the witness if there was anything in the testimony read to her which she desired to change, and she said "No, sir; I think that is right."

Defendant's counsel then asked the witness whether, before the execution of the lease and after negotiations for making it
46 had begun, any statement was made by the witness to Mrs. Perry in regard to the furniture belonging to the house which was not in the house at that moment, but was elsewhere being repaired. Witness replied that there was no furniture out to be repaired when Mrs. Perry took the house, and that no statement in regard to any such furniture was made to Mrs. Perry by the witness.

Witness further testified that when Mrs. Perry first looked at the house there was some conversation about the furniture; that when she took the house all the furniture was in it.

Witness further testified that the leases were prepared in duplicate and signed by herself, Mrs. Perry, and defendant's testator, and that one copy was handed to the witness by Mrs. Perry and the other to Mrs. Perry by the witness.

Witness further testified that she went to the house, 4 East 30th

street, on the 8th of November, 1873, and once or more between the first and 8th; that she went there once afterwards to see Mrs. Perry, but did not find her in and did not go in, and that she did not go again to the house until she went there to take possession; that when she went there to take possession the door was opened by the man John; that she was accompanied by a man from her lawyer's office, who asked John for the keys when the door was opened, but John replied that he would not give up the keys and went out, leaving Mrs. Deen and the lawyer's clerk in the house. He went out and left them there and said he would not give up the keys
47 until he saw Mr. Wilson and Mrs. Perry, and if they told him to give up the keys he would give them up; and he came back and said he had consulted them and they told him to give up the keys, and he did, and the witness got the man to stay there. He gave the keys to that gentleman, who remained there all night, the witness going away, and that John afterwards returned and gave up the keys to the lawyer's clerk, who remained there all night.

Witness further testified that she did not think that while the negotiations for the lease of the house to Mrs. Perry were going on there was any furniture belonging to the house which was temporarily out of it, being repaired.

Plaintiff's counsel then offered to read certain testimony given by Mrs. Perry from a printed case on appeal in an action between the parties to this action in regard to the same matter herein in dispute, which printed record did not contain the questions asked of the witness. It was admitted that Mrs. Mary C. C. Perry was dead.

Defendant's counsel objected on the ground that the abstract could not properly be read in evidence, as there were no questions to which he could object.

The court stated that it would allow exception to be taken as if the record contained questions and answers, and thereupon overruled defendant's objection.

The defendant thereupon excepted to such testimony as immaterial and the testimony was read, as follows:

"I said, 'Mrs. Deen, John is a man that is out of employment. I have known him for several years. If you like to leave the house in his care I am sure he will take care of it for you.'

48 "She said she would come in on Monday and make everything right for me, and then she handed the keys over to John, who was standing there, and bid me good-bye."

Counsel for plaintiff read the testimony of Mrs. Perry taken on the said former trial, to the effect that she left the house, leaving John Byrnes there; that John went there himself, and was not in the employ of the witness.

Plaintiff's counsel proved, read, and offered in evidence a remittitur from the court of appeals of the State of New York in the case of William M. Wilson and Mary C. C. Perry against Ann Maria Deen, filed November 15th, 1878, in the office of the clerk of the city and county of New York, and an order entered upon the remittitur in the supreme court of said State making the judgment of the

court of appeals the judgment of the supreme court, which order was entered in the last-mentioned court the 16th of November, 1878, from which remittitur and the record contained therein it appeared that the action was commenced in the supreme court on the 11th of March, 1874, by said Wilson and said Perry against Ann Maria Deen for the purpose of procuring the judgment of the supreme court restraining the prosecution of actions by the said Deen for the recovery of rent under aforesaid lease from Ann Maria Deen to said Mary C. C. Perry, dated October 29th, 1873, and for the cancellation of the said lease; that the complaint in said action was duly verified by both the said Wilson and the said Perry on the 11th of March, 1874, and the complaint contained the following, among other, allegations:

49 "And plaintiffs further show that neither the said William M. Wilson nor the said Mary C. C. Perry have [has] or ever had possession of the said house No. 4 East 30th street, in the city of New York, nor of the furniture therein, but said house and furniture is [are], and ever since October 29th, 1873, has [have] been, in the possession of the said defendant, Ann Maria Deen."

It further appeared by said remittitur that issue was joined in said action March 27th, 1874, by the service of a verified answer; that the cause was tried at special term in said court December 2d, 1874; that judgment was given for the cancellation of the lease at special term, which was affirmed at general term, but was in the court of appeals in all things reversed on the said 13th day of November, 1878; and it was admitted by counsel for the respective parties that the action mentioned in the said record of remittitur was that in which the opinion of the court of appeals was given, as is found reported in 74 N. Y. (Op., 531).

JAMES FORRESTER, a witness called on behalf of the plaintiff, being duly sworn, testified that he had computed the amount due for rent of premises 4 East Thirtieth street under the lease from the plaintiff to Mrs. Perry, and had deducted the amount paid by Mr. Sherman on the lease made to him by Mrs. Perry, and that the balance of the account, with interest, was the sum of $16,328.77.

It was conceded that the defence of *res adjudicata* was abandoned.

Plaintiff rested.

50 Defendant's counsel, by consent, read in evidence the testimony of Maggie E. Deen, taken on a former trial between the same parties. The testimony is to the effect that the witness remembered the night when Mrs. Perry came to the house 4 East Thirtieth street; that on the following morning Mrs. Deen handed the keys of the house to Mrs. Perry, and that Mrs. Perry handed them to John and told him to give Mr. Wilson the night-key if Mr. Wilson wanted it.

It being conceded that Mrs. Mary C. C. Perry was dead, counsel for defendant read from her testimony given on a former trial between the plaintiff herein and the defendant's testator as follows:

"Q. On the 25th of October last you stated you went to the house number 4 East Thirtieth street and went through it with this plain-

tiff and discovered the house to be only partly furnished. What, if any, promises did this plaintiff then make to you as to supplying the deficiency?"

But the plaintiff's counsel objected to the said question as tending to vary a written instrument. The court sustained the objection, and the defendant duly excepted.

Defendant's counsel stated that they offered to show that the house was taken for a specific purpose, which purpose was disclosed to the plaintiff; that in order to fit the house for that purpose it was necessary that certain furniture not then in the house, but, as defendant claims, stated by Mrs. Deen, the plaintiff, to belong to the house,
51 but temporarily absent, should be in there, and that the plaintiff promised that in case Mrs. Perry signed the lease and a guaranty was signed by the defendant the house should be put in the condition necessary for Mrs. Perry's occupancy, and that those statements were not complied with.

The court renewed its ruling excluding the said testimony, and defendant's counsel duly excepted.

It was admitted that the amount of rent unpaid up to and including March first, 1874, with interest thereon to May 9th, 1889, was $3,661.15; that the amount of such rent to and including April 1st, 1874, with interest to such date, was $4,444.87, and that the amount of such rent to and including November 1st, 1874, with interest to such date, was $10,557.45.

The testimony was then closed.

Argument was here made by counsel to the court, and the further trial of the case was adjourned till the 13th inst. Upon the trial being resumed on the said 13th day of May defendant's counsel asked the court to direct the jury to find a verdict for the defendant; but the court denied the said motion, and counsel for defendant duly excepted.

Plaintiff's counsel asked the court to direct a verdict for the plaintiff.

Defendant's counsel asked the court to be permitted to go to the jury on the question whether Mrs. Perry ever actually abandoned possession of the house, stating that such request was made
52 in view of the fact that the court had declined to rule that Mrs. Perry did not abandon the house. The court denied the motion, and counsel for defendant duly excepted to such denial.

Counsel for defendant asked the court to be permitted to go to the jury on the question whether Mrs. Deen re-entered for the purpose of protecting her property in the house; but the court denied the motion, and counsel for defendant duly excepted.

Counsel for defendant asked the court to be permitted to go to the jury on the question whether the house or the property within it was in danger of abuse or loss at the time when the plaintiff entered upon the premises.

The court denied the motion, and defendant's counsel duly excepted.

Counsel for defendant asked the court to be permitted to go to the jury on the question whether John Burns was the agent of Mrs.

Perry and in possession under her; but the court denied the motion, and counsel for defendant duly excepted.

Counsel for defendant asked the court to instruct the jury that they could not find a verdict for the plaintiff for any greater amount than the amount of the rent which came due prior to the 29th of March, 1874, at which date the letter offered in evidence as having been served on Mrs. Perry on behalf of the plaintiff was served; or, failing that, that the court instruct the jury that plaintiff could not recover any sum for rent after the date of the re-entry by Mrs.
53 Deen; but the court denied both motions, and defendant's counsel duly excepted to such denials.

Defendant's counsel further asked the court to instruct the jury that the plaintiff could not recover any part of the rent or any damage for rent accruing after the date of the new lease made to Mr. Sherman; but the court declined so to instruct the jury, and counsel for defendant duly excepted.

The court then directed the jury to find a verdict for the plaintiff for the sum of $16,328.77, and defendant duly excepted to such direction; and inasmuch as the said several matters do not appear by the record, the defendant's counsel requested the judge of said court to allow and sign this bill of exceptions, and the said judge did, in pursuance of said request and of the statute in such case made and provided, so allow and sign this bill of exceptions, containing in substance the whole of the testimony and evidence in said cause occurring during the term in this court aforesaid, to wit, at the April term of said court, A. D. 1889.

WM. J. WALLACE. [L. S.]

(Endorsed:) United States circuit court, so. dist. of New York. Ann Maria Deen ag't William Milne, as executor, &c. Bill of exceptions. Davenport, Smith & Perkins, attorneys for def't, 115 Broadway, New York city. The plaintiff's exceptions to defendant's proposed bill having been settled by consent, we consent that the bill of exceptions be signed and settled as they are herein contained, and we waive notice of settlement. New York, June 13, 1889. Jas. K. Hill, Wing & Shoudy, pl'ff's att'ys. U. S. circuit court. Filed June 15, 1889, *nunc pro tunc* as of Mar. 13, 1889. John A. Shields, clerk.

54 Supreme Court of the United States.

WILLIAM MILNE, as Executor of the Last Will and Testament of William M. Wilson, Deceased, Plaintiff in Error,
against
ANN MARIA DEEN, Defendant in Error.

Afterwards, to wit, on the second Monday of October term, 1889, before the justices of the said Court, at the Capitol, at Washington, came the said plaintiff in error, by Davenport, Smith & Perkins, his attorneys, and says that in the record of the proceedings aforesaid there is manifest error, in this, to wit:

In that in each and every of the said rulings of the court to which

exceptions were taken, and in the refusals of the court to admit testimony and to exclude testimony, to which refusals due objections were made and exceptions severally taken, and in the refusal of the court to submit all of the testimony to the jury and to direct the jury to find a verdict for the plaintiff in error or to find a verdict for the defendant in error for less than the full amount or to instruct the jury as prayed for, all of which was duly severally excepted to, and in other respects where exceptions were taken and allowed,

55 there was manifest error, as more fully and at large appears by the bill of exceptions as the same appears of record; and that by the record aforesaid it appears that judgment aforesaid was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error against the said defendant in error.

And the said plaintiff in error prays that the judgment aforesaid, for the errors aforesaid and other errors in the records and proceedings as the same appear more fully therein, may be corrected and that done which is right and according to law should be done, and that the said plaintiff in error may be restored to those things which he has lost by occasion of said judgment.

DAVENPORT, SMITH & PERKINS,
Attorneys for Plaintiff in Error.

(Endorsed:) Supreme Court of the United States. William Milne, as executor of the last will and testament of William M. Wilson, deceased, pl'tff in error, *vs.* Ann Maria Deen, def't in error. Assignment of errors. Davenport, Smith & Perkins, attorneys for plaintiff in error, No. 115 Broadway, New York city. Service of a copy of within assignment of errors is hereby admitted. Dated New York, July 16, 1889. Jas. K. Hill, Wing & Shoudy, att'ys for def't in error. U. S. circuit court. Filed Jul- 17, 1889. John A. Shields, clerk.

56 United States Circuit Court, Southern District of New York.

ANN MARIA DEEN
vs.
WILLIAM MILNE, as Executor, &c.

Know all men by these presents that we, William Milne, as executor of the last will and testament of William M. Wilson, deceased, late of the city, county, and State of New York, and residing at number 123 in West 78th street, in the said city, and John A. C. Gray, of number 709 Fifth avenue, in the said city, and Scott Foster, residing at number 29 East 83rd street, in the said city, are held and firmly bound unto the above-named Ann Maria Deen in the sum of thirty-six thousand (36,000) dollars, to be paid to the said Ann Maria Deen; for the payment of which, well and truly to be made, we bind ourselves and each of us, the successors of the said William Milne, as executor as aforesaid, and also the executors and adminis-

trators of the said John A. C. Gray and of the said Scott Foster, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the ninth day of July, in the year of our Lord eighteen hundred and eighty-nine.

57 Whereas the aforenamed William Milne, as executor as aforesaid, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the judge of the circuit court of the United States for the southern district of New York, in the second district:

Now, therefore, the condition of this obligation is such that if the above-named William Milne, as executor as aforesaid, shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN A. C. GRAY. [SEAL.]
SCOTT FOSTER. [SEAL.]
WILLIAM MILNE, [SEAL.]
As Ex'r — Wm. M. Wilson, Deceased.

In the presence of—
—— ——.

STATE OF NEW JERSEY, } ss:
County of Hudson, }

John A. C. Gray, being duly sworn, deposes and says as follows, to wit: I am one of the sureties named in and who executed the foregoing bond. I am worth the sum of thirty-six thousand dollars over and above all my just debts and liabilities and exclusive of property exempt by law from execution, and am a resident and freeholder within the southern district of New York.

JNO. A. C. GRAY.

Subscribed and sworn to before me this 11th day of July, 1889.

58 JAMES CLINTON BOLTON,
Master in Chancery, State of New Jersey.

CITY AND COUNTY OF NEW YORK, *ss:*

Scott Foster, being duly sworn, deposes and says as follows, to wit: I am one of the sureties named in and who executed the foregoing bond. I am worth the sum of thirty-six thousand dollars over and above all my just debts and liabilities and exclusive of property exempt by law from execution, and am a resident and householder within the southern district of New York.

Subscribed and sworn to before me this 12th day of July, 1889.

WM. J. LE COMPTE, JR.,
Notary Public (184), *N. Y. Co.*

CITY AND COUNTY OF NEW YORK, *ss:*

On this twelfth day of July, eighteen hundred and eighty-nine, before me personally came William Milne and Scott Foster, each

known to me and to me known to be the persons named in and who executed the foregoing bond, and they severally acknowledged that they executed the same.

[L. S.] WM. J. LE COMPTE, JR.,
Notary Public (184), *N. Y. Co.*

STATE OF NEW JERSEY, }
Hudson County, } *ss:*

On this eleventh day of July, eighteen hundred and eighty-nine, before me personally came John A. C. Gray, to me known and known to me to be one of the persons named in and who executed the foregoing bond, and acknowledged that he executed the same.

JAS. CLINTON BOLTON,
Master in Chancery, State of New Jersey.

59 STATE OF NEW JERSEY, }
Hudson County, } *ss:*

I, Dennis McLaughlin, clerk of the county of Hudson and also clerk of the circuit court and court of common pleas holden therein, do hereby certify that Jas. Clinton Bolton, before whom the foregoing acknowledgment was taken, was at the date thereof a master in chancery in and for said county and State, commissioned and sworn and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such master and verily believe the signature purporting to be his is genuine.

In witness whereof I have hereunto set my hand and affixed the seal of said courts and county this 12th day of July, A. D. 1889.

[L. S.] DENNIS McLAUGHLIN, *Clerk.*

60 (Endorsed:) United States circuit court, southern district of New York. Ann Maria Deen against William Milne, as executor. Supersedeas bond. Davenport, Smith & Perkins, attorneys for def't, No. 115 Broadway, New York city. Approved and taken this 12th day of July, A. D. 1889. Wm. J. Wallace. U. S. circuit court. Filed Jul- 15, 1889. John A. Shields, clerk.

61 The United States of America to Ann Maria Deen, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October, A. D. one thousand eight hundred and eighty-nine, pursuant to the writ of error filed in the office of the clerk of the circuit court of the United States for the southern district of New York, in the second circuit, wherein William Milne, as executor of the last will and testament of William M. Wilson, deceased, is the plaintiff in error, and you, the said Ann Maria Deen, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ or error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, this 12th day of July, A. D. one thousand eight hundred and eighty-nine.

WM. J. WALLACE,
Judge of the Circuit Court of the United States
for the Southern District of New York.

62 [Endorsed:] E. & A. A. 841. Supreme Court of the United States. William Milne, as ex'r, &c., pl'ff in error, *vs.* Ann Maria Deen, def't in error. Citation. Davenport, Smith & Perkins, attorneys for pl'ff in error, No. 115 Broadway, New York city. Service of a copy of within citation is hereby admitted. Dated New York, July 15, 1889. Jas. K. Hill, Wing & Shoudy, att'ys for def't in error.

[Stamped:] U. S. circuit court. Filed Jul- 16, 1889. John A. Shields, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 1184. William Milne, as executor of the last will & testament of William M. Wilson, deceased, plaintiff in error, *vs.* Ann Maria Deen. Filed July 31, 1889.

Supreme Court of the United States.

WILLIAM MILNE, AS EXECUTOR, ETC.,
Plaintiff in Error,

against

ANNA MARIA DEEN,
Defendant in Error.

Brief for Defendant in Error.

WING, SHOUDY & PUTNAM,
Attorneys.

ESEK COWEN,
Counsel.

Supreme Court of the United States.

WILLIAM MILNE, AS EXECUTOR, ETC.,
Plaintiff in Error,

against

ANNA MARIA DEEN,
Defendant in Error.

Brief for Defendant in Error.

WING, SHOUDY & PUTNAM,
Attorneys.

ESEK COWEN,
Counsel.

In the Supreme Court of the United States.

WILLIAM MILNE, AS EXECUTOR, ETC.,

Plaintiff in Error.

against

ANNA MARIA DEEN,

Defendant in Error.

This is a writ of error directed to the Circuit Court of the Southern District of New York, to review a judgment of said court entered upon a verdict directed by the court in favor of the plaintiff, and defendant in error, for the sum of $16,633.30 damages and costs recovered as rent reserved in a lease.

STATEMENT OF FACTS.

Early in the present century, that is to say, on the 29th day of October, 1873, one Mary C. C. Perry rented of the defendant in error, by lease dated that day, the house No. 4 East Thirtieth street, in the city of New York, for the term of two years and ten months at the agreed rent of $450 per month. The said lease was signed by said W. M. Wilson as guarantor for lessee. The rent for the month of November, 1873, was paid by the lessee, but she refused to keep the house, on the ground that the lessor had not furnished it as agreed upon by the parties prior to the execution of the lease. Mrs. Deen then began an action in the Marine Court against Wilson, the surety, to recover the rent for the month of December, 1873. Wilson answered in the action, setting up that the lease was obtained from his principal by fraud, and was void, the fraud consisting in the failure of the lessor to furnish the house in the manner verbally agreed upon. The case was tried and a verdict and judgment rendered for the defendant, Wilson. The plaintiff appealed to the General Term, and the rent for January, 1874, then being due, began a new action in the same court for that installment. At this point in the proceedings it would appear

that Mr. Wilson concluded that a monthly suit in the Marine Court for two years and nine months would not be conducive to his peace of mind. Accordingly he began a suit in the Supreme Court in the name of himself and Mrs. Perry against Mrs. Deen, n which he alleged the execution of the lease; that it was obtained by fraud, and the recovery of the judgment in the Marine Court, and asked, by way of relief, that the lease should be canceled, and the defendant restrained from bringing any more actions for the rent or prosecuting the two already brought. The defendant answered, denying the fraud and admitting or alleging the recovery of the judgment in the Marine Court, and the appeal therefrom. This last case came on to be tried at the Special Term before Judge Van Brunt. The judge was no sooner informed that the single issue in the case was conclusively settled in favor of the plaintiff Wilson, by a prior adjudication in the Marine Court, then he announced that he would not go on with the trial. The reason he gave was, that he might be obliged to decide contrary to the former adjudication in the Marine Court, and he would not be put in that position.

The counsel for Wilson then asked the judge how it would be if the actions in the Marine Court were discontinued, to which he replied that then the equity suit could proceed as though there had been no suit in the Marine Court. Counsel for Wilson then told the counsel for Mrs. Deen that he would consent to vacate the judgment in the first suit in the Marine Court if Mrs. Deen would discontinue the second suit. This was agreed to in open court in the presence of the judge and of the parties, Mr. Wilson being present and making no objection, and it was taken down by the stenographer and embodied in two written stipulations, signed by the counsel in duplicate, and exchanged by them.

After exchanging these stipulations, the trial of the equity suit proceeded, and no further reference was made by counsel or court to the former adjudication on the same point in the Marine Court.

The Special Term held the lease void and ordered it to be canceled. This judgment was affirmed by the General Term, but reversed by the Court of Appeals, on the ground that the alleged fraud was merely a failure to comply with an oral stipulation made prior to the execution of the lease, and which was merged in that instrument.

Wilson v. Deen, 74 N. Y., 531.

It had taken something like four years to obtain a decision from the Court of Appeals, and the whole of the rent had become due. Armed with this decision, holding that the lease was valid, Mrs. Deen naturally thought that she could collect the rent, and accordingly began an action in the United States Circuit Court for that purpose. Her counsel were considerably surprised, when the defendant set up the prior judgment in the Marine Court, which he had agreed to vacate four years before, as a prior adjudication on the same point. However, the case came on to trial, and the Circuit Court held that the judgment was only a bar to the particular installment of rent involved in that suit, and gave the plaintiff judgment for the whole amount, except the rent for December, 1873. The Supreme Court of the United States, to which the case was carried by writ of error, found itself unable to concur with this very original view of a *res adjudicata*, and reversed the judgment, and sent it back for a new trial.

Wilson's Executor v. Deen, 121 U. S., 525.

In the meantime, and in the month of July, 1884, Mrs. Deen began an action to compel the defendant to carry out his agreement to vacate the judgment in the Marine Court, which he had made nearly ten years before. On the first trial the complaint was dismissed on the ground that the plaintiff had an adequate remedy at law, namely, by motion in the Marine Court. The General Term promptly reversed this dismissal.

The case was again tried at Special Term, and the learned judge who held that court dismissed the complaint on the merits.

The General Term again reversed. On the third trial the plaintiff at last succeeded, and the judgment was affirmed by the General Term and Court of Appeals, the decision of the last named court being reported in 113 New York Reports, 303, so that the former adjudication in the Marine Court, which was the sole ground of reversal when the case was here before, is now effectually disposed of. On the second and last trial in the Circuit Court, the plaintiff proved the lease and guaranty. (Fols. 28–32.)

She then proved that, about the 11th day of November, 1873, the lessor returned the lease canceled, saying that it was obtained by false representation, and she would not take possession of the premises. (Fols. 34, 39.) That the house was afterwards

occupied by disreputable women, of which fact she was informed. (Fols. 37–39.) That afterwards and on March 27, 1874, she served a notice on Mrs. Perry, the lessor, and on the defendant, that she would resume possession of the premises on the first day of April then next, let them on account of the tenant, for the remainder of her term, and look to her and the defendant for deficiency in rent, expenses, and damages. (Fols. 35–37.) That she took possession about the twenty-ninth of April, and attempted to secure a tenant, advertised the house, and employed agents; that the most advantageous offer was by one David H. Sherman, to whom she let the house, on the 27th of November, 1874, at a rent of $300 a month, payable half-yearly, in advance. (Fols. 39–48.)

The plaintiff also proved that the "man John," mentioned in her notices of March 27, 1874, was not a servant of the lessee, Mrs. Perry, or in her employment. (Fols. 47, 48.) After proving the amount due, the plaintiff rested, and the defendant offered to prove that before executing the lease the plaintiff promised that in case the lease and guaranty were executed, the house should be put in condition necessary for Mrs. Perry's occupancy. The court excluded the evidence and the defendant excepted. The testimony here closed, and the defendant asked the court to direct a verdict for the defendant, which was refused, defendant excepting. Defendant then made several requests to direct a verdict for sums less than the whole amount claimed, but each of said requests was refused, and the defendant excepted. The court then directed a verdict for the plaintiff for $16,328.77, and the defendant duly excepted. Judgment was duly entered on the said verdict, and the defendant brought error to this court.

POINTS FOR RESPONDENT.

I.

There can be no pretense that any defense to this action upon the merits, was actually proved. The only question touching the merits, arises upon the rejection of a question and offer of the defendant, at folios 50 and 51 of the printed record. The question and offer were properly overruled and rejected.

1. The cause of action in the equity case that went to the Court of Appeals, as the court will see by the report of that case

(Wilson v. Deen, 74 N. Y. 531), was that Mrs. Deen had procured the execution and delivery of the lease and guaranty, by fraud and false representations, which consisted in an alleged promise of Mrs. Deen before the lease was executed to put additional furniture into the house. After that court had decided that the legal effect of the lease could not be modified by parol, this action was brought and the defendant set up *an entirely different defense.* He no longer asserted that the lease and guaranty were executed and delivered, and that such delivery was procured by fraud and false representations, but he *denied that they were ever executed or delivered.*

2. The answer begins with a positive denial of the execution and delivery of the lease and guaranty. (Fol. 17.)

It then proceeds to say, in substance, that Mrs. Perry, the lessee, before the execution of the lease, visited the premises and found that the house was only partly furnished; that she informed the defendant that she wanted a furnished house to be used as a first-class boarding-house, and that she had no furniture or money to supply the deficiency. That plaintiff said the missing furniture was out to be cleaned and repaired, and that she would restore it before the first day of November. (Fols. 17 and 18.) That the papers were signed on the day of their date, but that the plaintiff promised to add to them a schedule of the furniture *that she agreed and promised to put in the house*, which schedule was to be signed by the plaintiff and Mrs. Perry, and that *the papers were thereupon to be delivered and become operative.*

The lease and guaranty were not to take effect or become operative, until such furniture was put into the house, and a schedule of the same was annexed and signed by the parties. (Fol. 19)

The answer further alleges that the furniture never was put into the house according to the agreement; that the schedule never was prepared or signed, and that said proposed guaranty and proposed lease never was actually delivered. (Fol. 19.)

3. Thus it will be seen that the sole defense set up, in the answer, was that, although the lease and guaranty were signed and duplicates exchanged, it was on the condition that they should not be regarded as actually delivered, until the plaintiff had put in the house the furniture agreed upon, and the schedule had been signed and annexed to the lease.

It is true that the defendant, at folio 19 of the record, alleges that the plaintiff made these representations falsely, and to fraudulently obtain from the lessee and the defendant their signatures, but the answer lacks the essential element of such a defense, in failing to allege that they were induced, by such representations, to execute and deliver the lease and guaranty, and did so, relying upon the truth thereof.

The defendant could not suffer any serious injury by affixing his signature to a paper which was "never executed or delivered."

4. The court will search the record in vain for a question, or offer of the defendant, tending to prove the only defense set up in the answer. There was nothing said about a schedule of the furniture, nor about the delivery of the lease or guaranty. They were produced by the plaintiff at the trial, formally executed by the defendant and his principal. They were, therefore, presumed to have been delivered upon the day of their date.

Greenleaf Ev., § 297.

Besides, the delivery was directly proved by the testimony of the plaintiff. (Fol. 46.) No contradiction of this testimony was offered or any proof that any condition was attached to the delivery. At folio 50, the defendant asked Mrs. Perry, the lessee, what promises the plaintiff made to her about supplying the deficiency in the furniture. This was ruled out, and the defendant then offered to show, in substance, that the house, being only partly furnished, the plaintiff promised, in case the lease and guaranty were signed by Mrs. Perry and the defendant, that the house should be put in the condition necessary for Mrs. Perry's occupancy, and that such promise was not kept. It was clear that proof of the promise had no tendency to establish any defense set up in the answer.

5. But if the answer had contained such a defense, the offer would have been inadmissible, because it would have directly contradicted the written contract. The lease, which was dated and executed October twenty-ninth, conveyed to the lessee, for a term of years, the house known as No. 4 East Thirtieth street, "with the furniture therein," that is, the furniture in the house, at the date of the lease, "a schedule of which," that is, of the furniture then in the house, was to be made in duplicate, not before the lease was

delivered, but "upon the party of the second part taking possession of the premises," which she had no right to do before the first of November.

To prove that the instrument was not only a lease of the furniture then in the house, but also a lease of an indefinite quantity of furniture, which the plaintiff was to put in the house prior to the first of November, would have been a flat contradiction of the writing by parol. To admit such evidence would have been a plain violation of the rules of evidence governing the trial of cases in the State of New York.

Wilson v. Deen., 74 N. Y., 531.

And the rule in that case is no more strongly stated than it is in many of the decisions of this court.

Hunt v. Rousmanier, 8 Wheat., 174.
Forsythe v. Kimball, 91, U. S, 291.
Specht v. Howard, 16 Wallace, 564.
Richardson v. Hardwick, 106 U. S., 252.

II

There was no error committed by the court below, in the admission or rejection of evidence at the trial.

1. At folio 33 the plaintiff, to show that the lessee of the house, Mrs. Perry, had abandoned it soon after the lease was executed, read the testimony of a witness on the former trial, Henry M. Walker, to the effect that Mrs. Perry gave him the lease to return to Mrs. Deen; that he called upon Mrs. Deen for that purpose, but failed to see her; that he then sent it to her by mail, with a letter. The plaintiff produced the letter and offered it in evidence. The defendant objected that it was the letter of a third person, who was not shown to have authority to write it. The objection was overruled, and defendant excepted. The witness was authorized to return a canceled lease. He had an implied authority to state the purpose for which it was returned. If he had returned the lease personally, what he said at the time would have been part of the *res gestæ*. It was none the less so when it was said in a letter. Besides, the evidence was given to justify the plaintiff, in resuming possession of the property. Whether the letter was true or not, the plaintiff had a right to believe it was true, and, in either case, it was a justification.

2. At folio 36 the court admitted a duplicate of a notice served on the defendant, against the objection that the paper served was the best evidence. This ruling was not erroneous for several reasons.

a. The paper was not a contract but a mere notice. In the case of a contract, the parties to it *agree* that the writing shall be the evidence of the intent of the parties, and it must be produced if possible. But there is no such understanding as to a mere notice, which may be verbal or in writing, at the option of the party giving it. Accordingly, it was held in England at an early period that a party may put in evidence a duplicate notice, without giving notice to produce the one served.

Tyler on Eq., 551.
Walls v. Atcheson, 3 Bing., 362.
Joey v. Orchard, 2 Bos. & Pruller, 41.

And in New York it has always been the rule that the contents of a written notice may be proved either by a duplicate or by parol.

Tower v. Wilson, 3 Caines, 174.
Willoughby v. Carleton, 9 Johns., 136.
Johnson v. Haight, 13 Johns., 470.
McFadden v. Kingsbury, 11 Wend., 667.
Paton v. Lent, 4 Duer, 231.

Indeed, if the rule were otherwise, an attorney giving notice to produce papers on a trial would be in a bad fix. A *second* notice to produce the *first* would be required, and a *third* to produce the *second*, and so on *ad infinitum*.

b. Moreover, the case shows that the defendant's counsel had ample notice to produce the original. Such notice was given on the ninth (fol. 36), and the court then adjourned to the thirteenth. (Fol. 51.) Upon the statement of the counsel upon the day of adjournment that he had looked among his papers and could not find this notice, the court admitted the duplicate. Four days' notice was as good as four years.

3. At folios 37 and 38, the plaintiff proposed to prove, by the Rev. Samuel Burchard, that soon after the lease to Mrs. Perry and before the plaintiff resumed possession, he observed that the house was occupied by disorderly persons, and communicated that fact to the plaintiff. This evidence was objected to as immaterial, but

admitted. The ruling was right. The position of the defendant was that Mrs. Perry had surrendered the lease, and that the plaintiff had accepted such surrender. Any circumstance showing that she was compelled to resume possession to protect her property from damage and destruction, was proper to repel any presumption that by taking possession she had accepted the surrender of the lease. The same consideration applies to the evidence of the plaintiff as to the condition of the house. (Fol. 39.)

The other objections relate to the measure of damages, and do not need to be separately considered.

III.

The court below correctly held that the true measure of damages in this case was the rent reserved in the lease, with interest from the time it was payable, after deducting the amount of rent received by her under her lease to Sherman, at $300 per month.

1. The answer did not set up as a defense a surrender of the lease and could hardly have done so, as it alleged that the lease was never delivered. But the complaint for the purpose of fixing the true amount of damages, alleged the notice to the lessee and the defendant, and the lease to Sherman and made it necessary or at least proper, for the plaintiff to put these facts in evidence. The defendant then claimed that by taking possession of the premises and reletting them the plaintiff had accepted a surrender of the lease in spite of her explicit notice of March 27, 1874, given to both the lessee and the defendant, that she would take possession for the protection of her property and would relet on account of Mrs. Perry.

The surrender of a lease may be an express or implied contract, usually the latter, but it is always a *contract.* There must be a mutual agreement, the minds of the parties must meet, in surrendering a lease, as much as in executing it.

If a lessee abandons possession of the demised premises, and the lessor, without anything more being said or done, takes possession and occupies them herself, or lets them to another tenant, that is, no doubt, evidence of an implied contract of surrender. But where, as in this case, the landlord says to the tenant, "you have abandoned "my house and left it to become a den of prostitutes and thieves; I

"must take possession of it to protect my property from destruction. "I will relet it not as owner, but as your agent, for the purpose of "reducing the damages which your conduct has made inevitable, "and which one of us must bear, and I shall hold you responsible "*on the lease* for any difference between the rent therein reserved, "and the rent received on such reletting," what earthly ground is there for holding that the minds of the parties have met in a contract of surrender? Conceding in this case that the intent of the lessee to surrender is plain (though she declared at the time that the the lease was void), what evidence is there of an intent on the part of the plaintiff to accept the surrender? Can a certain act be held to amount to an implied contract, when the actor notifies the other party that he does *not* intend that his act shall have that effect.

2. That a landlord, whose tenant has abandoned possession of the leased premises, may, on proper notice to the tenant, relet them, and hold the tenant responsible for the difference in the rent, is settled by ample authority.

In *Walls* v. *Atcheson* (3 Bingham, 362), the lessee quit in the middle of the month, and the landlord let them to another person There being no evidence that the premises were let on account of the lessee, it was held that the lease was surrendered

But the court said "she ought to have given the defendant notice "of her intention, that her intention was to let the premises *solely* "*on his account*"

Auer v. *Penn* (99 Penn. St. Rep.) is directly in point, and the charge of the trial judge was so just and reasonable that I quote it in full. The action, as in this case, was against the *surety* of the tenant. The judge said, "If a man refuses to continue your tenant, "gives up the house into your hands, why, then you have a right "to put a bill upon the house, and try to rent it, because if you rent "it it is so much saved, so much saved to the surety of the tenant, "because you have got to give an account of every cent you make "out of the house; and, certainly, it is much better for the tenant "that you let the house, and get something for it, than to lock the "door and lie by and sue the tenant, or surety, for the whole term "for which he has taken it, so, that being for the benefit of both "parties, it is not presumed that the landlord has accepted a surren- "der because he has taken and leased the house." The Supreme

Court of Pennsylvania, to which the case was appealed, said, "We "see no error in this case. It is good sense as well as good law."

In *Myer* v. *Smith* (33 Ark., 627), it is held that where the lessee abandons the leased premises, refuses to pay rent, and repudiates his tenancy, without fault of the lessor, the latter may stand upon the contract of leasing, and recover the whole rent, or he may, in such case, take possession of and relet the premises for the benefit of whom it may concern, crediting the proceeds upon his lease.

Bloomer v. *Merrill* (1 Daly, 485) arose in the Court of Common Pleas of New York city, a court which passes upon more landlord and tenant cases than any other three courts in the country. In that case, the tenant informed the landlord that he should leave the premises at a specified time. The landlord told him that if he did he should let the premises on his (the tenant's) account and hold him responsible for the deficiency. The tenant moved out, and the landlord sent a person to occupy the house. It was held not to amount to a surrender, and that the tenant was liable.

3 Aside from direct authority, the principle that a party entitled to sue for breach of contract must do nothing to enhance the damages, and must, on the contrary, use reasonable exertion to render the injury as light as possible, runs through the whole law of contracts. Certainly, no court has ever held that the efforts of such a party to mitigate the damages and lessen the injury he is likely to suffer, and to be punished by the loss of his cause of action.

It was conceded at the trial of this case that the rule, as above stated, applied to all personal contracts, and as to them was eminently just and equitable, but it was argued with wonderful gravity, that there was something in the nature of real estate, which prevented its application to contracts respecting that species of property — probably some reminiscence of the feudal system. This reminds one of Mrs. Nickleby's judicial opinion as to the reason why French shoemakers were always killing their sweethearts, and then committing suicide — "something in the leather," she supposed. Certainly, there is no better reason for saying that a rule of law recognized as beneficial, when applied to all other contracts, has no meaning when the contract is a lease, and if there never had been a judicial authority on this exact point the court would avail itself of this case to "make a precedent."

The question is not difficult. Must a landlord whose tenant has abandoned the leased premises refrain from using them to produce an income, during the whole period of the term, at the peril of losing his cause of action for the rent? That is the precise position of the defendant in this case. To preserve his right of action, the landland must, in view of inevitable litigation, conduct himself in the exact manner which, if he is right, will inflict the most injury upon his tenant, and if wrong, will result in the greatest loss to himself.

The court will never sanction a doctrine deliberately intended to *increase* the evils of litigation, while the rule adopted by the trial court is so reasonable in itself, so supported by analogy, so consistent with justice, equity and fair dealing between man and man, that it can never receive the condemnation of this great tribunal. It does not lie in the defendant's mouth to say that, because the plaintiff has saved him two-thirds of the amount for which he would otherwise be liable on this lease, she shall recover nothing.

4. These considerations become stronger when we perceive that one proposition of the defendant was, that the court should direct a verdict for the plaintiff, only for the rent that accrued before the re-entry. And it seems to us that if the defendant was right on any proposition, he was right on that. If the plaintiff, for any sufficient reason, took and retained possession of the premises, no rule of law or equity bound her to let them remain untenanted; on the contrary, it would be quite doubtful if the defendant could not mitigate damages to the amount that he could prove she *might* have obtained on a reletting. The broad proposition of the defendant is, then, that the landlord cannot take possession of the premises, or exercise control over them, under any circumstances, without accepting the surrender. The house may be a haunt of prostitutes, who will give it a character that will render letting it to respectable people impossible; the landlord may complain of it as a disorderly house, but he cannot enter on the premises and eject the inmates. It may be a harbor for thieves; the landlord may send the police to arrest them, but he cannot close the doors and keep them out. The house may be on fire; the landlord may sound the nearest alarm, but he cannot enter to extinguish the flames, and keep possession to save his property from similar accidents.

If the rule of the trial court is ever applicable, it is applicable to this case. Here the tenant did not merely abandon the premises, she repudiated the lease for fraud, and returned it canceled. She could not pretend that the re-entry, by the plaintiff, prevented her from occupying or letting the premises. The plaintiff was informed that the female inmates of the house had accosted a venerable clergyman, on the street, inviting him to enter, for unmentionable purposes. According to the argument of the defendant's counsel, the plaintiff was confronted with this pleasant alternative. Either she must leave her house, with its costly furniture, in the hands of those drunken harlots, or she must discharge her tenant and her surety from the entire rent reserved in this lease. The proposition ought to answer itself.

5. As a last resource, the zealous counsel for the defense contended, in the court below, that even if the *tenant* continued liable, on the covenant, for rent, the reletting of the premises discharged the *surety*. This was said to be because the contract between the plaintiff and his principal was altered without the defendant's consent. The contract, on the part of the plaintiff, conveyed certain premises to the tenant, for a term of years. That contract was executed the moment the lease was delivered, and the surety had nothing to do with it. The tenant did not contract to occupy during the term, and certainly the plaintiff could not keep her in possession against her will. The tenant entered into an executory contract to pay the rent, and to that the defendant became a surety. But the covenant to pay rent has never been changed or modified, it remains obligatory and intact. The only thing that the plaintiff has done is to collect, from a third person, a portion of the damages for which the tenant would otherwise be liable. But that did not affect the contract, and how the rights of the surety were injuriously affected by such a proceeding is not very perceptible. The legal situation is exactly the same, as if Mrs. Perry, with the consent of the plaintiff, had under-let the premises for $300 per month, agreeing that the under tenant should pay his rent to the plaintiff. Such a letting would not have discharged the surety, nor was he discharged by the actual transaction proved in this case.

The usual ground for the discharge of a surety is that his remedy, against his principal, has been interfered with. But nothing pre-

vented the defendant from paying, on the first of every month, the $150 difference between the rents received in the two leases, and suing his principal at once. It is true that the rent on the original lease was payable in advance, but so was the rent on the Sherman lease, so that the defendant knew every first of the month that his principal was in default for the amount recovered here.

The judgment of the Circuit Court was correct in all respects, and should be affirmed.

ESEK COWEN,
Of Counsel for Respondent.

WING, CHOUDY & PUTNAM,
Attorneys.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1184.

...

WILLIAM MILNE, as Executor of the Last Will and Testament of William M. Wilson, Deceased,

Plaintiff in Error,

vs.

ANN MARIA DEEN.

In Error to the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR PLAINTIFF IN ERROR.

Supreme Court of the United States.

WILLIAM MILNE, as Executor of the Last Will and Testament of of WILLIAM M. WILSON, deceased,

Plaintiff in Error,

vs.

ANN MARIA DEEN.

No. 1184.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

The action below was brought by the defendant in error against the testator of the plaintiff in error, as surety on a lease made by the defendant in error to one Mary C. C. Perry, to recover rent thereunder. The lease is of the house Number 4 East Thirtieth street in the city of New York, for two years and ten months from November 1st, 1873, at the rent of four hundred and fifty dollars a month, payable monthly in advance (Record, original page 11). It contains a clause of re-

entry for failure to pay the rent, or for default in any of the covenants in the lease. It also contains covenants to pay the rent, to pay water rates, not to assign, let or underlet without permission, not to make any alterations in the premises, and not to use the premises for extra hazardous business without consent, and other covenants (Record, original page 28).

The guaranty (p. 15) is that "if default shall be made by the said Mary C. C. Perry in the payment of the rent *and* performance of the covenants contained in the within lease on her part to be paid *and* performed, that I will well and truly pay the said rent, or any arrears thereof that may remain due unto the said party of the first part, *and also* all damages that may arise in consequence of the non-performance of said covenants, or either of them, without requiring notice of any such default from the said party of the first part."

The complaint alleges (p. 8) that the lessee entered into possession of the premises and paid the first month's rent, but has not paid any further rent, and that the lessee abandoned the premises in or after December, 1873, and that afterwards the plaintiff, in order to preserve the premises, let them on account of the lessee for three hundred dollars a month for the remainder of the term. Judgment is demanded for eight thousand five hundred and fifty dollars, being the amount of rent unpaid up to the time of the new letting and the balance of rent unpaid after the new letting.

The answer (p. 17) among other things, contains denials of the allegations as to the abandonment of the premises by Mrs. Perry and the notice to her of the intention of defendant in error to resume possession and of the allegation as to the amount due.

William M. Wilson, the original defendant, died April 2d, 1884 (p. 23). The action was revived and continued against this plaintiff in error as his executor (p. 22).

Upon the trial the plaintiff, after putting in evidence the lease and guaranty, read in evidence the testimony given on a former trial by Henry M. Walker, who testified that Mrs. Perry gave him the lease of 4 East Thirtieth street with directions to return it to Mrs. Deen, and that having called on her and failed to see her, he sent it to Mrs. Deen by mail, together with a letter written by himself. The letter was then offered in evidence, but counsel for plaintiff in error objected to it as immaterial and incompetent, it being a letter from a third party who was not shown to have any authority to write it. The objection was overruled and the letter admitted under defendant's exception. The letter is as follows (p. 34):

New York, Nov. 11th, 1873.

"Mrs. M. A. Deen, present.

"*Dear Madame:* Mrs. Perry has asked me to notify "you that she will not take possession of your house, "No. 4, Thirtieth street, and repudiates her signature "to the lease, as she considers it was obtained by false "representation, and will require you to pay her back "the month's rent she paid you, amounting to $450.

"Yours respectfully,

HENRY M. WALKER.

"She returns the lease cancelled."

Plaintiff's counsel then called CHARLES MURRAY, who testified to serving on Mrs. Perry on March 27th, 1874, a letter from Mrs. Deen, which was then offered in evidence, and admitted, under defendant's exception to the overruling of his objection that the letter was immaterial and incompetent to bind the defendant. It is as follows:

"New York, March 27th, 1874.

"*Dear Madame:* As you appear to have abandoned "the house No. 4 East Thirtieth street to the man John, "and I am informed that there is great danger of the "furniture being injured, removed and lost, I shall, in "order to protect the property, take possession of the "premises on the first day of April next and rent them "for the remainder of your term on your account and "look to you for any deficiency in rent and expenses "on reletting, as well as for all damages that I may have "sustained by reason of the loss of or injury to the "furniture up to that date. If you have any objec- "tion to my taking possession of the premises, be "kind enough to inform me by letter addressed to the "care of James K. Hill, 62 Wall street, New York City.

"Yours, &c.,

A. M. DEEN."

Plaintiff's counsel further offered in evidence a paper, which the witness Murray testified was a copy of one signed by Mrs. Deen, which he served personally on defendant's testator on March 27, 1874. It was objected to as being a copy, but admitted in evidence under defendant's exception (p. 36). It is as follows:

"NEW YORK, March 27th, 1874.

"*Dear Sir.*—As Mrs. Perry appears to have aban- "doned the house No. 4 East 30th street to the man "John, and I am informed that there is great danger of "the furniture being injured, removed, and lost, I "shall, in order to protect the property, take possession "of the premises on the 1st day of April next, and "rent them for the remainder of her term on her ac- "count, and look to her and you for any deficiency in "rent and expenses in reletting, as well as for all

"damages that I may have sustained by reason of the "loss of or injury to the furniture up to that date. If "you have any objection to my taking possession of "the premises, be kind enough to inform me by letter, "addressed to the care of James K. Hill, 62 Wall "street, New York City.

"Yours, &c.,

"A. M. DEEN."

Plaintiff then called SAMUEL D. BURCHARD, who testified that he passed the house 4 East Thirtieth street on an evening in March, 1874, and some females came to the door, and asked him to come in, and that he inferred from their dress and their language, that they were improper persons. Witness further testified, under objection and exception by defendant's counsel, that he communicated what he had seen to Mrs. Deen at the time of the occurrence (p. 38).

The plaintiff, called on her own behalf, testified, under objection and exception, that Dr. Burchard had informed her in March, 1874, that the house, 4 East Thirtieth street, was being used for improper purposes (p. 38). She also testified that after she had received a letter from Mr. Walker, with the lease enclosed, and had received the information from Dr. Burchard, she sent the letters to Mrs. Perry and Mr. Wilson, which had been put in evidence, but that she received no notice from Mrs. Perry or Mr. Wilson in reply (p. 39). Witness further testified that she went on the premises on April 29th, 1874. She was then asked what she found to be the condition of the house. This question was objected to as immaterial, but the objection was overruled, and the witness replied, under exception by defendant, that the furniture in some parts of the premises was very badly used (p. 39).

She was then asked whether anyone was in possession

at that time, and replied that there was a man named John there, but that she had not put him in possession.

She further testified, under objection and exception by defendant (p. 40), that she advertised the house and put it in several agents' hands to be leased, and had a bill put upon it, but that the first reliable tenant she could find was Mr. Sherman, who took a lease of it from December 1, 1874.

The lease to Mr. Sherman was offered in evidence and received under defendant's objection and exception. It is a lease of the same house for two years and five months from December 1, 1874, at $3,600 a year, payable half-yearly in advance (pp. 41, 44).

On CROSS-EXAMINATION the witness testified that she never informed either Mrs. Perry or Mr. Wilson that she had made a lease to Mr. Sherman. She further testified that on November 1, 1883, she gave up the keys of the house to Mrs. Perry, and that Mrs. Perry took possession. That the man John mentioned in the witness' direct examination was present at the time, and that Mrs. Perry gave one of the keys to him. That he was a servant of Mrs. Perry's and had been such for several years, and had assisted in bringing Mrs. Perry's things in, and that the witness had never seen him before; and she further testified that her testimony given on the previous trial, to the effect that the witness handed both keys of the house to Mrs. Perry, and that she handed them to John and told him to take charge of them and to give one of them to Mr. Wilson, a son of defendant's testator, if he wanted it, was correct (p. 45).

Witness further testified on cross-examination that when she went to the house to take possession on April 29th, 1874, the door was opened by the man John; that a lawyer's clerk who accompanied her asked John for the keys, but John said he would not give up the

keys, and went out, saying that he would not give them up until he saw Mr. Wilson and Mrs. Perry; that he afterwards came back and said he had consulted them and that they had told him to give up the keys, which he did, and that the lawyer's clerk was left in the house over night (pp. 46-47).

Plaintiff's counsel then read, under objection and exception by defendant, the testimony of Mrs. Perry, who was admitted to be dead, given in another action, between the parties to this action, to the effect that Mrs. Perry told Mrs. Deen that John was a man out of employment, and that if Mrs. Deen chose to leave the house in his care, it would be well taken care of, and that Mrs. Deen handed the keys to John and went out, and that John was not in the employ of Mrs. Perry. (p. 48).

Plaintiff's counsel further offered and read in evidence the record in an action brought by Wilson and Perry against Deen in the Supreme Court of the State of New York, which was brought by Wilson and Perry to set aside the lease in question on the ground of fraud; the complaint contained an allegation that neither the said Wilson nor the said Perry ever had possession of the house 4 East 30th street.

Plaintiff having rested, defendant's counsel read by consent the testimony of MAGGIE E. DEEN, given on a former trial, to the effect that at the time when Mrs. Perry came to the house, Mrs. Deen handed the keys to Mrs. Perry, and Mrs. Perry handed them to John and told him to give Mr. Wilson the night-key if Mr. Wilson wanted it (p. 50).

It was admitted that the amount of rent unpaid to and including March 1, 1874 with interest to the date of trial was $3,661.15; that the amount of such rent, to and April 1, 1874, with interest was $4,444.87, and that the amount of such rent, to and including

November 1, 1874, with interest, was $10,557.45 (p. 51). The full amount claimed with interest was proved to be $16, 328.77.

Both sides having rested, the Court was requested to direct the jury to find a verdict for the defendant, which request was denied and defendant excepted. Defendant also requested the Court to make other directions and to let the case go to the jury on certain questions, but all these requests which are set out more fully in our assignments of error, were denied under defendant's exceptions.

The Court then directed the jury to find a verdict for the plaintiff for $16,328.77; defendant excepted; a verdict was found accordingly and judgment entered thereon.

Thereafter the defendant below duly procured the settlement of his bill of exceptions and sued out the present writ of error to this Court.

ASSIGNMENT OF ERRORS.

I.—The Court below erred in denying the motion of counsel for defendant that the Court direct the jury to find a verdict for the defendant.

II.—The Court below erred in granting the motion of counsel for plaintiff that the Court direct a verdict for the plaintiff, and in directing the jury to find for the plaintiff for $16,328.77.

III.—The Court below erred in denying the motion of defendant's counsel to be permitted to go to the jury on the question whether Mrs. Perry ever actually abandoned possession of the house.

IV.—The Court below erred in denying the motion of defendant's counsel to be permitted to go to the jury on the question whether Mrs. Deen re-entered for the purpose of protecting her property in the house.

V.—The Court below erred in denying the motion of counsel for defendant to be permitted to go to the jury on the question whether the house or the property within it was in danger of abuse or loss at the time when the plaintiff entered upon the premises.

VI.—The Court below erred in denying the request of counsel for defendant to be permitted to go to the jury on the question whether John Burns was the agent of Mrs. Perry and in possession under her.

VII.—The Court below erred in refusing the request of counsel for defendant below that the Court instruct the jury that they could not find a verdict for plaintiff for any greater amount than the amount of the rent which came due prior to the 29th of March, 1874.

VIII.—The Court below erred in denying the request of counsel for defendant below that the Court instruct the jury that plaintiff could not recover any sum for rent after the date of the reentry by Mrs. Deen.

IX.—The Court below erred in denying the request of counsel for defendant below that the Court instruct the jury that the plaintiff could not recover any part of the rent or any damage for rent accruing after the date of the new lease made to Mr. Sherman.

X.—The Court below erred in overruling the objection of counsel for defendant to the admission in evidence of the letter of Henry M. Walker to Mrs. M. A. Deen dated New York, November 11, 1873, and which is to be found at page 14 of the record.

XI.—The Court below erred in overruling the objection of counsel for defendant to the admission of evidence that the lease referred to in the letter mentioned in the eleventh assignment of error was a duplicate copy of the lease already put in evidence, and was returned to Mrs. Deen by Henry M. Walker with Mrs. Perry's name cancelled.

XII.—The Court below erred in overruling defendant's objection to the admission in evidence of the letter addressed to Mrs. Perry signed "A. M. Deen," and dated "New York, March 27, 1874," which is to be found at page 15 of the record.

XIII.—The Court below erred in overruling the objection of counsel for defendant to the admission in evidence of the letter beginning "Dear Sir," signed "A. M. Deen," and dated "New York, March 27, 1874," which is to be found at page 15 of the record.

XIV.—The Court below erred in overruling the objection of counsel for defendant below to the following question asked of Samuel D. Burchard, and in permitting the same to be answered: "Did you communicate what you saw and heard there on that occasion, to Mrs. Deen?"

XV.—The Court below erred in overruling the objection of counsel for defendant below to the following question asked of Ann Maria Deen, and in permitting the same to be answered: "Do you remember of his (Dr. Burchard) communicating to you the fact that your house was being used for improper purposes?"

XVI.—The Court below erred in overruling the objection of counsel for defendant below to the question, asked of the said Ann Maria Deen, what she found to be

the condition of things in the house on the 29th of April, 1874.

XVII.—The Court below erred in overruling the objection of counsel for defendant below to the question, whether anyone was in possession of the house on the 29th of April, 1874.

XVIII.—The Court below erred in overruling the objection of counsel for defendant below to the question, asked of the said Ann Maria Deen, what effort she made to procure a tenant for the premises in question.

XIX.—The Court below erred in overruling the objection of counsel for defendant below to the reading of the testimony given by Mrs. Perry and contained in a printed case on appeal between the parties to this action, which testimony is to be foudd at page 31 of the record, beginning at the words "I said" on line 35 of the said page, and ending with the words "Good-bye" on line 40 thereof.

FIRST POINT.

No liability on the part of the Guarantor was made out on the Trial.

The plaintiff has not established any right of action on the guaranty, for, even if it be admitted that rent was due and not paid, yet it is not shown that the other covenants in the lease were broken; and the guaranty admits but of one meaning, which is that the guarantor

is to be liable if the principal, in addition to failing to pay the rent, also fails to perform the covenants.

The words are: "if default shall be made in the pay-"ment of the rent, *and* performance of the covenants," and the promise made upon this condition, is to pay the rent *and also* damages for the non performance of the covenants.

The repeated use of the conjunctive would leave no room for a liberal construction, if an instrument like a guaranty could be liberally construed.

In the lease itself the *dis*junctive is carefully used, showing that the conveyancer understood the force of his words:

"If any rent shall be due or unpaid, *or* if default shall be made in *any of* the covenants," &c.

The guarantor made himself liable on a single and indivisible condition; defendant in error is seeking to make him liable upon as many separate conditions as there are covenants in the lease.

But if there were any room for a liberal construction, the rule would apply that contracts of suretyship are *strictissimi juris*, and to be construed most favorably to the guarantor.

Ward vs. *Stehl*, 81 N. Y., 408;
Barus vs. *Barron*, 61 N. Y., 42;
D. L. & W. R. R. Co. vs. *Burkhard*, 36 Hun, 57.
See also cases cited *infra* on p. 26 *et seq.*

We concede that in the interpretation of wills, the Courts have read "and" as meaning "or"; but in such cases the other parts of the will have shown that the testator used the *wrong word*, and the Courts, with a liberality which they have permitted themselves in no other class of cases, have substituted the *right word* in its place. As was said by Lord ST. LEONARDS in *Grey*

vs. *Pearson*, 6 H. L., C. 90, where he dissented from the refusal of the House of Lords to change "and" into "or":

> "In such cases the Court does more than reject a word, for it substitutes one word for another, and, indeed, one that is directly opposed in its import to the one rejected. * * Upon the whole will the paramount intent is regarded, and directions, contrary to that view, are, in effect *struck out of the will*. So when the testator's intent is clear, but he fails in words to provide for the precise event which happens, the Courts supply the words."

We cite this forcible statement of the rule for the interpretation of a will, as the best argument to show that it cannot apply to the interpretation of a guaranty.

SECOND POINT.

In no event was the plaintiff below entitled to recover more than the amount of the rent due when she resumed possession of the demised premises.

I.

THE PRINCIPAL HERSELF (AND CONSEQUENTLY THE SURETY), WAS DISCHARGED BY THE ACT OF THE PLAINTIFF IN ENTERING ON AND TAKING POSSESSION OF THE DEMISED PREMISES, FOR THAT ACT WAS EITHER A RE-ENTRY FOR BREACH OF THE CONDITION TO PAY RENT, OR AN EVICTION, AND THE RENT FOR THE REST OF THE TERM WAS EITHER EXTINGUISHED BY THE RE-ENTRY OR SUSPENDED BY THE EVICTION.

A.

There is no merit in the claim made by the plaintiff below that she had the right to re-enter, because the tenant had abandoned the premises, or had never taken possession of them.

The making and delivery of the lease gave constructive possession to the tenant; actual possession need not have been shown.

Bellasis vs. *Burbrick*, 1 Salk. 209.

But it was shown on the trial, by the testimony of the plaintiff below and of her daughter, that she deliv-

ered up the keys of the house to the tenant, who handed them to the man John, who was in possession when she re-entered.

There was, therefore, a taking of possession, and there was no abandonment.

But even if the premises had been abandoned by the tenant, or she had never taken possession of them, the landlord could not have resumed possession and still claimed that the lease was operative.

Day vs. *Watson*, 8 Mich., 535;
Rice vs. *Dudley*, 65 Ala., 68.
Shannon vs. *Burr*, 1 Hilt., 39.

> "During the continuance of the term, the "original lessee is so far divested of the posses- "sion, that if he were to find the premises vacant "he would have no more right to enter upon "them than a stranger."
>
> 1 Washburn R. P., Ch. X, § 6.
> *Id.*, Ch. X, § 2.

B.

Plaintiff also claimed to be authorized to re-enter and still treat the lease as subsisting, because of an agreement implied from the writing of the letters of March 27th, 1874, to Mrs. Perry and Mr. Wilson.

So far as the letter to Mr. Wilson is concerned, it was not proved. The learned Judge who tried the case allowed a copy to be put in evidence, although the original had not been called for before the trial, and exception was taken to its admission.

Of this letter, however, as well as of that to Mrs. Perry, it need only be said, that it could not constitute an agreement between the parties, because it was never assented to. If it was *a proposition for a new contract*

or arrangement, clearly a failure to reply to it was not an acceptance.

These letters, however, do not contain a suggestion for an agreement, but merely an assertion of the plaintiff's rights and intentions. They state that Mrs. Perry has abandoned the premises, and assume the right to take possession. If the right did not exist, it was not conferred by a failure to reply to the letter.

C.

The re-entry of the landlord, then, unless it was for condition broken, was not justified by any right conferred on her by law or by agreement of the parties, and was, therefore, an eviction.

If it was a re-entry for condition broken, it worked a forfeiture of the term and terminated all rights under the lease.

Hall vs. *Gould*, 13 N. Y., 127;
Hackett vs. *Richards*, *id.*, 138;
Stuyvesant vs. *Davis*, 9 Pai., 428;
Jones vs. *Carter*, 15 M. & W., 718.

If it was an eviction, the result was the same.

Colburn vs. *Morrill*, 117 Mass., 262;
Christopher vs. *Austin*, 11 N. Y., 216;
Taylor's L. & T., § 377.

II.

EVEN IF POSSESSION WAS RESUMED BY CONSENT, STILL THAT RESUMPTION HAD THE INEVITABLE EFFECT OF SUSPENDING THE OBLIGATION TO PAY RENT, AS SUCH, AND THE SURETY, WHO BOUND HIMSELF FOR NOTHING ELSE, CEASED TO BE LIABLE.

A.

If it could be considered that there was a new agreement between the landlord and the tenant, under which the landlord re-entered into possession, it would be an agreement for a surrender of the lease, and the obligation of Mrs. Perry to pay the difference between the rent obtained from the new tenant and that which she had agreed to pay under the lease would not be surrender to pay, not *rent*, but an unliquidated sum, for the payment of which the surety never bound himself. The right to recover *rent* would not survive such an agreement.

Bain vs. *Clark*, 10 Johns., 434.

The possession of the premises by the landlord is inconsistent with the continuance of the lease and still more inconsistent is it that the landlord should relet to another tenant. "He cannot at the same time have "two original tenants holding under distinct inde- "pendent leases." (*Smith vs. Niven*, 2 Barb., 180.) Re-entry, or re-letting to another tenant by the consent or with the acquiescence of the tenant, constitutes a surrender by operation of law.

Darison vs. *Gent*, 1 H. & N., 744.

In this case, which was a suit in ejectment, the plaintiff claimed title under a lease from the Dean and Chapter of Durham. It appeared that previous to the making of the lease, they had made another lease covering the same term to another person, but the new lease was made with the assent of the former lessee.

It was held that the assent of the former tenant to the new lease constituted a surrender by operation of law.

Thomas vs. *Cooke*, 2 B. & Ald. 119.

The defendant holding under a lease from the plaintiff underlet the premises. On his failing to pay his rent the plaintiff notified the under-tenant to pay to him, which the under-tenant did.

It was held that the jury were justified in finding that the plaintiff accepted the new tenant with the defendant's consent, and that there was a surrender by operation of law.

Nickells vs. *Atherstone*, 10 Q. B., 944.

The defendant held the premises as tenant of the plaintiff under a lease for three years. He left the premises at the end of the first year, paying rent up to the end of the quarter, during which he left. Afterwards he "asked the plaintiff to let the rooms for him and the plaintiff said he would try to do so." Afterwards the defendant wrote to the plaintiff in answer to an application for payment of the rent, "I trust that you may be able to rent the rooms to another person and on better terms."

Plaintiff rented the rooms to another person and afterwards brought this suit for rent crediting the defendant with the amount he had received from the new tenant.

It was held that there was a surrender by operation of law, the Court assuming that the new lease was made with the defendant's consent.

Lord DENMAN, C. J., said:

"As far as the plaintiff, the landlord, is concerned, he has created an estate in the new tenant which he is estopped from disputing with him, and *which is inconsistent with defendant's term*."

See also:

Amory vs. *Kannofsky*, 117 Mass., 351;
Hanham vs. *Sherman*, 114 *id.*, 19, 23;
Talbot vs. *Whipple*, 14 Allen, 177;
Stobie vs. *Dills*, 62 Ill., 432;
Mackellar vs. *Sigler*, 47 How. Pr., 20.

B.

Indeed, the capital fact that after April 29th, 1875, and until the end of the term, the landlord was in possession, disposes of the claim for rent, and it is not of prime importance whether the re-entry of the landlord was made under her right to re-enter for condition broken, or was, as we claim, an eviction of the tenant, or, as she claims, either the exercise of a right which arose from the tenant's alleged abandonment of the premises, or the result of an agreement between her and the tenant.

> "A rent service is something given by way of "*retribution* to the lessor for the land demised to "him by the tenant ; and consequently, the les- "sor's title to the rent is founded upon this ; "that the land demised is enjoyed by the tenant "during the term included in the contract ; for "the tenant can make no return for a thing he "has not ; if, therefore, the tenant be *deprived* of "the thing *letten*, the obligation to pay the rent "ceases because such obligation has its force only "from the consideration which was the enjoy- "ment of the thing demised."
>
> Gilbert on Rent, 145.

"A man cannot have land in his possession, and a "rent issuing out of the same land at the same time."

Hodgkins vs. *Thornborough*, Pollexf., 142.

And, therefore, if the landlord buys in the term of an under tenant, and enters into possession, the rent which would otherwise be due from the principal tenant is suspended during the term so purchased.

Rowlyn's Case, 4 Rep., 52 b.

Bac. Abr. "Rent" (L).

Hodgkins vs. *Thornborough*, *supra*.

And even an express agreement between a landlord and the tenant cannot keep alive the obligation to pay *rent* when the landlord has resumed possession.

Hall vs *Gould*, 13 N. Y., 127.
Bain vs *Clark*, *supra*.

C.

If, therefore, the tenant remained under any obligation to the landlord after the re-entry, it was not an obligation to pay rent, nor, indeed, was it an obligation arising in any way under the lease, and the defendant below was not, therefore, responsible for it under his testator's guaranty.

If the tenant's obligation was not one which arose under the contract guaranteed by the surety, it matters not whether the extent of the obligation was increased or diminished or remained the same. The contract is not the one for the performance of which the defendant's testator bound himself and his guaranty cannot be extended an hair's breadth beyond the liability, for which he contracted.

> "The liability of a surety is not to be extended
> "by implication beyond the terms of his contract.
> "To the extent, in the manner and under the
> "circumstances pointed out in his obligation he
> "is bound, and no further. * *
> "He has the right to stand on the very terms
> "of his contract, and if he does not assent to any
> "variation of it, and variation is made, it is
> "fatal."
>
> Per STORY, J., in *Miller* vs. *Stewart*, 9 Wheat., 630.

Whitcher vs. *Hall*, 5 B. & C., 269.

This was an action of assumpsit against a surety upon

a contract for the letting of the milking of thirty cows for one year. The plaintiff agreed with the principal that the latter should have thirty cows part of the year and twenty-eight the rest.

It was held that this was a variation from the contract which discharged the surety.

BAYLEY, J.

> "The new agreement was binding only on those persons who were parties to it. He (the surety) had a right to insist upon literal performance of the original contract. If a new bargain was made he had a right to exercise his judgment whether he would become a party to it. There may perhaps be very little difference between the two contracts, but the question does not turn on the amount of the difference, but the question is whether the contract performed by the plaintiff is the original contract to which the defendant was a party. If it is, then Jones is bound by it, otherwise he is not."

Bacon vs. *Chesney*, 1 Stark., 153.

In this case the defendant guaranteed payment of goods to be sold by the plaintiff to B. on eighteen months' credit. By arrangement between the plaintiff and B. the goods were sold only on twelve months' credit. The plaintiff waited six months longer and then sued the surety.

It was held that the contract was not the one on which the defendant had agreed to be bound and that he was not liable.

Holme vs. *Brunskill*, L. R. 13 Q. B. D., 495.

This was an action against a surety on a bond conditioned that at the expiration of the lease the tenant

would surrender in good condition a flock of sheep, which was leased with the land. While the lease was in force, the lessee and the landlord agreed that part of the premises should be surrendered and the rent reduced.

It was held that this was a variation which discharged the surety from his obligation in regard to the sheep; and that there was no question for the jury as to whether the tenant had made any substantial or material variation in the relation between the parties as regarded the tenant's capacity to fulfill the condition of the bond.

Taylour vs. *Wildin*, L. R., 3 Exch., 303.

The defendant was surety on a lease from year to year made by the plaintiff. The landlord gave notice to quit, but afterwards withdrew it. It was held that the old tenancy was terminated by the notice and a new one created, and that the surety was not liable on the new tenancy.

Rees vs. *Berrington*, 2 Ves. Jr., 540.

In this case, Lord ELDON, C., speaking of a variation of a contract, said:

"You cannot keep the surety bound and transact his affairs, (for they are as much his as your own), without consulting him."

See also:

Bonar vs. *McDonald*, 3 H. L. C., 226.
Glyn vs. *Hertel*, 8 Taunt., 208.
Phillips vs. *Astling*, 2 Taunt., 206.
Leeds vs. *Dunn*, 10 N. Y., 469.

D.

But the supposed new agreement between the land-

lord and the tenant, if it had ever been legally made, would not have substituted an exact equivalent for the obligation arising under the lease.

So long as the premises remained unoccupied, it could not be ascertained until the end of each month what the deficiencies for that particular month would be, or whether there would be any, for it would have been the duty of the plaintiff to rent the premises at any time during the month when she could find a tenant. The plaintiff, therefore, could not have sued Mrs. Perry until the end of the term, or at any rate, she could not have sued her for any month's rent until the end of that month. But under the lease the rent was payable in advance. The effect of the agreement, therefore, would have been to give time to the principal, and therefore to release the surety.

Coombe vs. *Wolf*, 1 M. & Scott, 247.
Orme vs. *Young*, Holt, N. P. C., 84.
Horne vs. *Bodwell*, 5 Gray, 457.
Greeley vs. *Dow*, 2 Metcalf, 176.
Rees vs. *Berrington*, 2 Ves. Jr., 540.
Samuell vs. *Howarth*, 3 Meriv., 272.
Gahn vs. *Niemcewicz*, 11 Wend., 317.

THIRD POINT.

We insist upon the other errors specified in our assignment of errors, as entitling us to a reversal; the questions of law thus raised, however, are, we believe, covered by the points already discussed in this brief.

FOURTH POINT.

The judgment of the Circuit Court should be reversed, and the cause remanded with directions to enter a judgment in favor of the plaintiff in error.

October Term, 1889.

EDWARD C. PERKINS,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 1184.

WILLIAM MILNE, as Executor of the Last Will and Testament of WILLIAM M. WILSON, Deceased,

Plaintiff in Error,

vs.

ANN MARIA DEEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

IN THE

Supreme Court of the United States.

WILLIAM MILNE, as Executor of the last Will and Testament of WILLIAM M. WILSON, deceased, Plaintiff in Error,

vs.

ANN MARIA DEEN.

No. 1184.

Brief in Reply.

The retreat of counsel for the defendant in error from a position confessedly untenable on legal argument and authority, into a region of imagination and rhetoric, would seem to leave us in possession of the true field of contest. The new ground which he has chosen seems to us to be beyond the ken of a tribunal which circumscribes itself by principle and precedent, but so far as we ourselves are concerned, there is nothing in the facts of the case which need deter us, through any consideration of prudence, from meeting the learned counsel upon his own chosen ground.

I

It may be well, however, in the first place, to summarize our original position, and see how far any attack upon it has been abandoned.

That position was, that the landlord, having resumed possession of the demised premises, and put an end to the possession of the tenant, did so either with or without the consent of the tenant; that if it was without consent, the landlord either re-entered for breach, which she had a right to do, or evicted the tenant, which she had no right to do, but that in either case the right to claim rent was gone; that if it was with consent, it was a surrender, because the old relation of landlord and tenant was necessarily terminated when the landlord became her own tenant, or got a new one; and that if the consent implied an agreement to pay an unliquidated sum in the future, that was not the agreement guaranteed by our testator, and consequently not one upon which a recovery against us could be had, even if this suit had been brought upon it, instead of being brought on the lease, for *rent*.

II

Now we understand the learned counsel to concede, and very properly too, that from the letter written by Degen to Perry no consent (let alone a new contract) can be inferred. The re-entry, moreover, as he contends, was not an exercise of the right to re-enter for condition broken. What was it, then, but an eviction pure and simple? For it was an eviction unless justified by some legal right.

III.

It is just here that the learned counsel introduces us to new facts and new law. Conceding that as a general rule the tenant is possessed of an estate in the demised premises which entitles him to possession, he excepts the case where the tenant allows the premises to become a "harbor for thieves" and a "den of prostitutes," and wilfully or negligently commits or permits serious injury to the property. Is the landlord, he says, compelled to stand by and see these things going on? Is it possible that the reputation of his house, that his very property itself, is to be destroyed before his eyes, and that he cannot lift his hand to prevent it? And to this supposed state of affairs he applies a principle of law, hitherto unnamed, because hitherto unknown, but which we may call the law of PARAMOUNT NECESSITY. This new law, upon the tenant's committing the heinous offences described, allows the landlord to step in, as a sort of guardian angel at law of the lessee, and prevent him from running up a heavy bill of damages (for which the landlord is secured by the surety); and, as a sort of compensation to the landlord for this good action, and a punishment to the tenant, this *lex non scripta* thereupon substitutes an entirely new and inconsistent contract in place of the lease—a contract with only one side to it, under which the landlord, without availing himself of the privilege, secured to him by the lease for the very purpose of meeting such a case, of terminating the tenancy, may keep the tenancy in force, so far as his rights under it are concerned, and at the same time abrogate all the tenant's rights under it.

IV

We might well afford to admit the existence of the law of Paramount Necessity, because it does not happen to have any application to the facts disclosed by the record. It cannot, of course, apply, except where there is absolute danger of grievous loss to the landlord unless he sets it in operation.

Now the *record facts* are, that Mrs. Perry, after she had taken possession, finding that she had been deceived as to the proper furnishing of the house, and that it was consequently unfit for a boarding house, which was the purpose for which he had hired it (Record, pp. 50, 51), brought a suit to have the lease declared void for fraud (Record, p. 48); that Mrs. Deen, on the other hand, insisted that the lease was valid and binding (Record, p. 49); and that pending the litigation, Mrs. Perry left "the man John" in charge of the house, having given him the keys in Mrs. Deen's presence (pp. 45, 50).

Then it appears, from the testimony of the Reverend Doctor Bernard that as he passed the house one evening "some females came to the door and asked him to "come in; that he inferred from their dress and lan- "guage that they were improper persons" (p. 37).

This he communicated to Mrs. Deen, and this is absolutely all she knew when she went to the house and turned out "the man John" and took possession. She says that after this re-entry she found that "the furni- "ture in *some of* the premises was very badly used (p. 39) but even this she did not know when she re-entered.

Now this, after all, was hardly enough to justify the interference of the law of Paramount Necessity, and thus it became necessary for the learned counsel, in order to bring that law into operation, to construct from these simple facts the glowing picture which he has presented

in his brief. The tenant, it is suggested, having abanddoned the premises, maliciously instigated "the man John" to invade the premises; he brought with him a gang of "drunken harlots" and turned it into "a harbor for thieves" and a "den of prostitutes," who not content with destroying its reputation, sacked and pillaged it of its contents, and did all but tear down the walls themselves.

Until such a state of things is proved to have existed by some more authoritative record than the brief of counsel, we need not trouble ourselves much with the law of Paramount Necessity.

V.

We venture, however, to make one suggestion while we are on the subject. This landlord, in the lease itself, reserved the privilege of terminating the lease, by a reentry, not only for non-payment of rent, but also for the doing of just such acts as those of which we are accused by her counsel. Why was this privilege reserved by the lease—why is it reserved in every lease—if the commission of such acts gives the landlord, by virtue of the law, apart from convention, a superior privilege covering all the advantages, and none of the disadvantages, of a forfeiture by re-entry?

VI.

Interwoven with the doctrine of Paramount Necessity we find a suggestion of another principle, somewhat

better known, but which has no application to this case. It is, that a person in whose favor a claim for damages accrues against another, is bound to reduce that claim as much as possible. The inference drawn is, that Mrs. Deen having, or rather being about to have, a right to collect a fixed amount of rent from Mrs. Perry and Mr. Wilson, which she knew they would decline to pay, was bound to reduce that fixed amount by all conceivable means, even by a violation of Mrs. Perry's rights as a tenant!

The principle suggested can have no application except to a case of unliquidated damages, and, more scientifically stated, it amounts simply to this: that damages which a person can avoid suffering, are not imputable to anyone but himself. From a third person I can recover only such damages as I cannot myself prevent, because such damages are all that are inflicted on me *by that third person*. From a third person who has contracted to pay me a fixed sum of money for a consideration which I have performed, I can recover the whole of that sum of money, simply because he has agreed to pay it, and I am not compellable to exert myself to find him a customer for what he bought from me, under the penalty, if I fail to do so, of a reduction in the contract price.

The argument, indeed, proves too much.

In the case of *damages*, the injured party is *bound* to reduce them as far as possible, and he cannot recover any damages which his reasonable exertions could have averted.

Howard vs. *Daly*, 61 N. Y., 362;
Baker vs. *Drake*, 53 N. Y., 211.

On this argument, therefore, if Mrs. Deen had simply rested on her legal rights, remained satisfied with the obligation of principal and surety to pay the rent, and

then brought suit at the end of the term, it would have been a good defence to say "although the lease was "valid, we refused to pay rent; you should have ejected "us from the premises, against our wishes, and as our "agent by operation of law, and rented them to some "one else, and you cannot recover what you might "thus have earned by violating our rights."

VII.

The case of *Auer* vs. *Penn*, cited by counsel for defendant in error, is not exactly in point, for there the premises were voluntarily surrendered, whereas here possession was retained until the tenant's agent was ejected by the landlord. The case seems to have proceeded on the ground of a consent, or contract, that the premises might be relet and the tenant charged with the difference. The report does not state the terms of the guaranty on which the surety was held in this case; if it was a mere guaranty to pay rent, we can only say that the case is at variance with the cases cited in our brief and with the principles laid down in them.

The remark cited by counsel from *Walls* vs. *Atcheson* is at best a mere dictum, but we believe that all that was intended by the Court was that on the surrender the landlord might have made an arrangement with the tenant, by which the latter would become liable for the difference in rent.

Such an agreement was inferred from the negotiations between the parties in *Bloomer* vs. *Merrill*, and neither in this case nor in Walls *vs.* Atcheson, were the rights of a surety in question.

The conclusion of the whole matter is, that a weak legal position is to be bolstered up by an appeal to sympathy. This is not a case of hardship to the defendant in error; the hardship is all on the other side. Mr. Wilson guaranteed payment of the rent, of a house which was supposed and represented to be fitted for the only use to which the tenant could put it; the rent was very high, as is shown by the subsequent reletting. Mrs. Perry never was able to use the house; Mrs. Deen had it and used it herself till she let it, this time at a fair rent, and now it is attempted to hold the defendant to a liability beyond the terms of his contract when the consideration, even as concerns the principal, failed from the outset.

The defendant had an opportunity, when the lease was impeached by the tenant and her surety, either to accept their position as hers, re-enter the premises, and enjoy her own again; or to stand fairly and squarely on her rights against them, as they were afterwards adjudicated in the Supreme Court, and rely on their indisputable liability for her due under the lease. She was unwilling frankly to assume either of these positions, and sought to secure the benefits of both, and it is for this reason, and because of the inconsistent parts which she undertook to play, that she must, as we believe, finally fail in this action.

New York, January 4th, 1889.

EDWARD C. PERKINS,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1,184.

WILLIAM MILNE, as Executor of the Last Will and Testament of WILLIAM M. WILSON, deceased, Plaintiff in Error,

vs.

ANN MARIA DEEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Motion

To advance cause, under Rule 26, Subd. 4.

The plaintiff in error respectfully moves the Court to advance the above entitled case upon the ground that the same has already been adjudicated by this Court upon the merits and is now again brought up by writ of error.

The judgment from which the present writ of error is taken was rendered in an action originally brought

against William M. Wilson, the testator of the above named plaintiff in error, by Ann Maria Deen, the present defendant in error, to recover from him, as a surety, the sum of eight thousand five hundred and fifty dollars, with interest, for rent of a house in the city of New York, leased to one Mary C. C. Perry, payment of which rent was guaranteed by the said William M. Wilson.

The case was first tried before the Honorable Nathaniel Shipman, J. and a jury, on the sixteenth day of May, 1883, and resulted in a verdict and judgment for the said Ann Maria Deen for the sum of $12,026.89. A writ of error was taken to this Court from such judgment, and the said Wilson having died while the writ was pending, the proceeding was revived in the name of the present plaintiff in error as his executor. The case was argued in this Court by counsel for both parties on the fifth and sixth days of April, 1887, and the decision of this Court, entered April 25th, 1887, reversed the judgment of the Court below and remanded the cause, with direction to award a new trial. Such new trial was had before the Honorable William J. Wallace, J. and a jury on the ninth and thirteenth days of May, 1889, and resulted in a verdict for the plaintiff, rendered under direction by the Court, for the sum of $16,633.30

The contention between the parties, briefly stated, is as follows :

The lease in question was made for two years and ten months and the rent was payable monthly. The rent for the first year was paid, but no rent was paid thereafter. Shortly after the making of the lease the defendant in error took possession of the premises, claiming that they had been abandoned by the lessee, and afterwards relet them. The questions of law raised on the first trial, and on the previous hearing in this Court, were, whether the act of the defendant in error was a re-entry

or an eviction, and whether it terminated the obligation to pay rent; whether, if on the evidence, such act could be treated as having been done by the consent of the tenant, that consent did not constitute a new contractual relation between the lessor and lessee to which the guaranty did not apply, and also whether a certain judgment in another action between the same parties, which was pleaded and offered in evidence by the said Wilson as constituting *res adjudicata* to prove the invalidity of the lease (and which was excluded by the Court on the first trial) did constitute a bar to the action.

In the argument before this Court, all the questions raised on the record were fully argued. The Court, however, decided that the Judge below had erred in refusing to sustain the plea of *res judicata*, and held it to be unnecessary to examine and decide the other questions argued. The opinion of this Court will be found reported in 121 U. S., 525.

On the last trial no evidence was offered by the present plaintiff in error of the judgment upon which he had formerly relied as constituting *res adjudicata*, for the reason that since the determination of the case by this Court the said judgment had been vacated in a suit in the Supreme Court of the State of New York, between these same parties. He relied, however, as a defence to the action, on the other points presented on the previous trial and on the appeal to this Court, as well as on certain further points not necessary to particularize here.

The questions to be argued on the present writ of error, therefore, are mainly questions which have already been argued before this Court, and which would have been determined at that time and would have terminated this entire litigation, had it not been that the case unfortunately went off on another point which has since become immaterial.

The result has been to delay the winding up of the estate of the testator of the plaintiff in error, which might otherwise have been completed many years since, and to lock up the funds of the estate, which otherwise might long since have been distributed among the legatees of the said testator. For this reason it is earnestly desired that the Court should allow the case to be advanced under Subdivision 4 of Rule 26.

October Term, 1889.

EDWARD C. PERKINS,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

No. 1184.

WILLIAM MILNE, as Executor of the Last Will and Testament of William M. Wilson, Deceased, Plaintiff in Error,

vs.

ANN MARIA DEEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION FOR REHEARING.

Counsel for the plaintiff in error herein respectfully moves the Court, upon the following petition, to order a rehearing of this cause before the full bench.

Edward C. Perkins,
Of Counsel.

PETITION FOR REHEARING.

And now comes the plaintiff in error and respectfully petitions this honorable Court to grant him a rehearing in this cause before the full bench upon the following grounds :

I.

The cause was argued before this Court by counsel for both parties on the 6th and 7th days of January, 1890, and was then submitted to the Court, Mr. Justice Gray being absent by reason of illness, and only eight judges hearing the argument and participating in the decision. On the following Monday, to wit, the 13th day of January, the Chief Justice announced that the judgment below was affirmed by an equally-divided Court.

II.

This cause was tried in the court below before a judge of the circuit court, with a jury, and was determined by a direction to the jury to find a verdict for the defendant. Although it is true that the request for a direction of a verdict was made on a Friday and that the court took a recess till the following Monday before the direction was given, it is evident that the questions of law involved could not have been considered by the learned judge presiding at the trial with the same care and attention as if they had been fully argued and submitted to him under such circumstances as would have left him at liberty to take his own time for deliberation before rendering his decision.

III.

At the time of the trial below this cause had already been before this Court upon a writ of error, and it was the obvious, if not the declared, intention of either party, in case of an adverse decision, to bring up the questions of law involved for final determination here. It may therefore be fairly inferred that the weight of responsibility upon the

learned judge was not as great, nor the importance of a careful study of the cases in point and a deliberate conderation of the questions involved, as apparent, as in an ordinary case. Yet, if the petitioner is denied a rehearing before the full bench, his appeal to the Supreme Court of the United States because of the accident of the illness of one of the members of this Court, will have been virtually determined, by a single judge sitting at *nisi prius*.

That the questions involved were difficult and deserved study and deliberation is evident from the equal division of opinion upon them in this Court.

IV.

It is the misfortune of the petitioner that although most of the questions argued upon the last hearing were presented to this Court upon a previous appeal (as will appear from the report of the case in 121 U. S., p. 525, and from the briefs then submitted by counsel), the case went off on another point, and it was therefore unnecessary to examine these questions, which otherwise might then have been finally determined by a majority of the Court. The amount involved in the case is nearly eighteen thousand dollars, and forms a considerable part of the estate which your petitioner represents. The litigation has been long and expensive; the course of your petitioner in defending the claim against him has certainly been justified by the result, and it is submitted that the hardship to the petitioner and those whom he represents, in bringing this case twice before this Court, upon questions obviously serious and difficult, with only the result that has been reached, is a circumstance which commends this application to the indulgent consideration of the Court.

V.

While the questions of law involved are such as may not often come before this Court, they must frequently arise elsewhere throughout the United States, and a decision upon them, one way or the other, by the highest tribunal, will be of great value to the profession as well as to all owners of real estate.

VI.

Your petitioner is advised that similar applications have heretofore been granted by this Court. Such was the case in Clinkenbeard *vs.* The United States (21 Wall., 65), which was first argued after the death of Chief Justice Chase, and resulted in an affirmance by a divided Court, and in which a reargument was granted when the late Chief Justice Waite had taken his seat on the bench. Such was also the case in Patch *vs.* White (117 U. S., 210), although in that case counsel had had the advantage of making a full argument on appeal before the general term of the supreme court of the District of Columbia, and presumably the benefit of a careful consideration of the case by that tribunal.

Your petitioner, therefore, prays that, the premises being considered, the Court may see fit to grant the prayer of this his petition.

Respectfully submitted:

EDWARD C. PERKINS,
Of Counsel for Plaintiff in Error.

I certify that in my opinion the foregoing motion is meritorious, and the foregoing petition is proper to be filed.

EDWARD C. PERKINS,
Of Counsel for Plaintiff in Error.